FILE COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1959

No. 130

WILLIA NIUKKANEN, ETC., PETITIONER,

vs.

E. D. McALEXANDER, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 20, 1959
CERTIORARI GRANTED OCTOBER 12, 1959

No. 15990

United States
Court of Appeals
for the Ninth Circuit

WILLIA NIUKKANEN, also known as William Albert Mackie, Appellant,

vs.

E. D. McALEXANDER, Acting District Director, Immigration and Naturalization Service, Department of Justice, Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Oregon

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In The United States District Court
For The District of Oregon

Civil No. 9741

WILLIA NIUKKANEN, also known as WILLIAM NIUKKANEN, also known as WILLIAM ALBERT MACKIE, Petitioner,

vs.

JOHN P. BOYD, District Director, Immigration and Naturalization Service, United States Department of Justice, and ERNEST HOVER, Officer in Charge, Immigration and Naturalization Service Office, United States Department of Justice, at Portland, Oregon,

Respondents.

PETITION FOR WRIT OF HABEAS CORPUS AND COMPLAINT FOR INJUNCTIVE RELIEF TO PREVENT AGENCY ACTION

Comes Now Petitioner, Willia Niukkanen, and respectfully shows the Court and alleges:

I.

That the jurisdiction of this Court arises under United States Code, Title 28, Section 2241; United States Code, Title 5, Section 1009; United States Code, Title 28, Section 2201 and 2202. This is an action where petitioner is now in the custody of a person and restrained of his liberties under color or authority of the United States; and where review of administrative proceedings looking toward

petitioner's deportation from the United States as an alleged alien, unlawfully in the United States, is authorized pursuant to Section 10 of the Administrative Procedures Act; and wherein an actual controversy exists between petitioner and respondents, John P. Boyd and Ernest Hover, concerning the authority of said respondents further to continue custody over petitioner or to change the form of such custody or to detain him in actual physical confinement, subject to a declaratory judgment of this Court; and wherein injunctive relief to prevent irreparable injury to or harm to petitioner and to effectuate the review of said administrative proceedings is required.

II.

Petitioner is now in the custody of this Court by virtue of having heretofore been released upon bail by order of this Court.

III.

Respondent, John P. Boyd, is the District Director of Immigration and Naturalization, Seattle, Washington, and respondent, Ernest Hover, is a citizen of the United States and a resident of Portland, Oregon, who has been designated by the respondent, John P. Boyd, to exercise custody over petitioner. Respondent, Ernest Hover, is the Officer in Charge of the Office of the Immigration and Naturalization Service of the United States Department of Justice, in the City of Portland, Oregon.

IV.

Petitioner is a permanent resident of the City of Portland, Oregon, residing in premises located at 4326 North Montana Street, Portland, Oregon.

V.

That on or about the 17th day of June, 1952, respondent, John P. Boyd, issued a warrant for the arrest of petitioner, reciting as follows:

> "Whereas, from evidence submitted to me, it appears that the alien Willia Niukkanen alias William Niukkanen alias William Albert Mackie who entered this country at Sault Ste. Marie, Michigan, on the 5th day of September, 1909, has been found in the United States in violation of the immigration laws thereof, and is subject to be taken into custody and deported pursuant to the following provisions of law, and for the following reasons, to-wit: The Act of October 16, 1918, as amended, in that he has been, after entry, a member of the following class, set forth in Section 1 of said Act: An alien who was a member of the Communist Party of the United States."

That said warrant was served upon petitioner on or about the 12th day of September, 1952, at Portland, Oregon, and that thereafter a written notice signed by Roy J. Norene, and dated April 7, 1953, was served upon petitioner directing him to appear on May 11, 1953, at a certain place in the United

States Court House at Portland, Oregon, for a hearing to enable him to show cause why he should not be deported. That a purported hearing entitled "In re: Willia Niukkanen or William Niukkanen, now known as William Albert Mackie, In Deportation Proceedings, File: A-508530" was thereafter held before one Louis C. Hafferman, designated "Special Inquiry Officer" and participated in by one Howard L. Fenn, designated "Examining Officer." That after completion of said hearing, said Louis C. Hafferman issued a written decision holding petitioner deportable. That upon said decision, petitioner appealed from the order of said "Special Inquiry Officer" to the United States Department of Justice, Board of Immigration Appeals; that upon such appeal respondent contended that the evidence of record was insufficient to establish deportability and that the statute under which the charge had been laid was unconstitutional.

VI.

That petitioner duly filed and perfected an appeal to the Board of Immigration Appeals; that under the date of September 18, 1953, a written decision signed by one Thomas G. Finucane, as chairman of said Board of Immigration Appeals was issued, containing, among other things, the following:

> "Order: It is ordered that the appeal be and the same is hereby dismissed."

VII.

That on or about November 15, 1954, said Roy J.

Norene directed petitioner to appear on November 30, 1954, for deportation; that on or about November 16, 1954, petitioner duly filed with the United States Department of Justice, Immigration and Naturalization Service, a motion to reopen proceedings in order that petitioner might have an opportunity to apply for suspension of deportation, based upon the affidavit of petitioner; that thereafter by order dated November 29, 1954, said motion was denied by order which provided inter alia as follows:

> "Order: It is ordered that the motion be and the same is hereby denied."

That thereafter and on December 9, 1954, petitioner filed a supplemental motion to reopen proceedings with supporting supplemental affidavit in order that petitioner might have an opportunity to apply for suspension of deportation; that by letter dated December 8, 1954, said Roy J. Norene, predecessor in office to respondent Ernest Hover, directed William P. Mackie as bondsman for petitioner to surrender petitioner to his office on Monday, December 13, 1954, said letter in part providing as follows:

> "It is expected that he will be leaving Portland for Finland the same day."

That said supplemental motion to reopen proceedings and to stay execution of the order of deportation was duly and regularly filed and that application was made to said Roy J. Norene to stay execution of said order, pursuant to regulation prom-

ulgated by the Attorney General of the United States, (Title 8, Code of Federal Regulations). That thereafter a hearing was held upon said application and by order dated May 13, 1955, by the U. S. Department of Justice, Board of Immigration Appeals, petitioner's application for suspension was denied, as shown by the copy thereof attached hereto and marked Exhibit "A" and made a part hereof.

VIII.

That thereafter, petitioner filed a petition and an amended petition for writ of habeas corpus and a complaint for injunctive relief to prevent agency action in the United States District Court for the District of Oregon; that a hearing upon said complaint was held in said Court with the result that the Court dismissed said complaint; that thereafter an appeal was prosecuted from said complaint which was designated in this Court as Civil No. 7833, to the United States Court of Appeals for the Ninth Circuit, which Court affirmed the judgment of the said District Court; thereafter petitioner applied for a writ of certiorari from the United States Supreme Court but said writ was denied on December 16, 1957, by said United States Supreme Court.

IX.

That thereafter the petitioner filed a motion for a new hearing with the United States Department of Justice, Board of Immigration Appeals, on the grounds that on the 9th day of December, 1957, the United States Supreme Court decided the case of

"Rowoldt v. Perfetto", 355 U.S. 115, which decision so redefined the substantial and evidential requirements of membership in the Communist Party of the United States as to take petitioner out of the class of deportable aliens under the Immigration and Nationality Act; that on the 26th day of March, 1958, the said Board of Immigration Appeals, acting by and through its chairman, Thomas G. Finucane, did render an opinion and decision which states, among other things, as follows:

"Order: It is ordered that the motion be and the same is hereby denied."

X.

That thereafter the respondent Ernest Hover has indicated his intention by statements to the press and otherwise of causing the said petitioner to be taken into custody and to be deported from the United States; and that said action of deportation is imminently planned.

XI.

That unless injunctive relief hereinafter requested is granted petitioner will suffer irreparable injury by being taken into physical custody by respondent Ernest Hover, and will be denied liberty without due process of law; that petitioner has exhausted his administrative remedy.

XII.

That in order to afford proper relief to petitioner herein, it is indispensable that this Court review

the whole record of such administrative proceedings before the said Louis C. Hafferman, Roy J. Norene, and the Board of Immigration Appeals; that said record has previously been ordered produced by this Court in the case of this petitioner v. John P. Boyd and Roy N. Norene, Civil No. 7833, previously referred to herein, and this Court should cause said record to be taken from the files of this Court and placed in the file of this case in order that review of the whole record may properly be had.

XIII.

That the administrative proceedings and the order of deportation made by the said Louis C. Hafferman as hereinbefore referred to, and the Board of Immigration Appeals as set forth herein, were arbitrary, capricious, and not in accordance with law, were contrary to the constitutional rights, privileges and immunities of the petitioner, and deprived petitioner of rights under the laws relating to deportation of aliens and were without observance of said Constitution of the United States and the laws of the United States as interpreted by the United States Supreme Court. That the denial of a new hearing on the question of petitioner's eligibility for deportation by the Board of Immigration Appeals on March 26, 1958, was arbitrary, capricious, and not supported by substantial and creditable evidence in the record.

XIV.

That petitioner is not a person subject to de-

portation under the provisions of law on which said deportation proceedings are founded in that petitioner is not and never has been a member of the Communist Party, and particularly, has not been a member of the Communist Party after entry into the United States. That petitioner is not subject to deportation by reason of the fact that he has never been afforded a fair hearing upon the charges made against him in the warrant of arrest and said lodged charge; that petitioner is not subject to deportation by reason of the fact that he has never been afforded a fair hearing upon the question of whether or not his membership in the Communist Party, if admitted arguendo, was such a meaningful association as is required by the Immigration and Nationality Act as interpreted by the United States Supreme Court in the case of Rowoldt v. Perfetto as hereinabove referred to. That furthermore petitioner is not subject to deportation by reason of the fact that on the record heretofore made there is no substantial, reasonable, or probative evidence to show that petitioner's alleged association with the Communist Party was of the meaningful type of association required by the United States Supreme Court in the aforesaid decision. That said deportation proceedings were not conducted in accordance with Part 242, Chapter 1, Title 8, Code of Federal Regulations, and Section 242 of the Immigration and Nationality Act of 1952. That petitioner has been deprived of due process of law in the conduct of said deportation proceedings and

said hearing and that the findings of fact and conclusions of law and the order of deportation based thereon, and the subsequent orders of the Board of Immigration Appeals, were arbitrary, capricious, and not in accordance with law, were contrary to the constitutional rights, privileges and immunities of the petitioner, and deprived petitioner of rights under the Immigration and Nationality Act, and were without observance of the procedure required thereby and the regulations promulgated under said Immigration and Nationality Act. That furthermore said findings of fact and conclusions of law and the order of deportation, and further orders of the Board of Immigration Appeals, were not based upon reasonable, substantial and probative evidence. That the statutes upon which said deportation proceedings are based are unconstitutional and that petitioner is immediately threatened with deportation and deprivation of his liberty without due process of law.

XV.

That the Act of October 16, 1918, as amended (Section 22 of the Internal Security Act of 1950), insofar as they make past membership in the Communist Party of the United States grounds for deportation, are null and void as being bills of attainder in violation of the United States Constitution, Article I, Section 9, Clause 3.

XVI.

That the Act of October 16, 1918, as amended

(Section 22 of the Internal Security Act of 1950), insofar as they make past membership in the Communist Party of the United States grounds for deportation, are unconstitutional as being ex post facto laws.

XVII.

That the Act of October 16, 1918, as amended (Section 22 of the Internal Security Act of 1950), insofar as they make past membership in the Communist Party of the United States grounds for deportation, are null and void and unconstitutional as being in violation of the First and Fifth Amendments to the United States Constitution, in that such statutes abridge the right of freedom of speech of aliens, and particularly of this petitioner, and operate to depriye aliens, and particularly this petitioner, of liberty without due process of law.

XVIII.

That the denial of petitioner's application for suspension is arbitrary, capricious and an abuse of discretion, assuming, arguendo, that petitioner is otherwise deportable.

XVIV.

That petitioner has exhausted all administrative remedies available to him and is without recourse of law, except as this Court may grant him relief by way of review, declaratory judgment, injunction and writ of habeas corpus.

XX.

That petitioner is entitled to a review of said

administrative proceedings, and upon said review, said proceedings should be set aside and declared null and void; that, alternatively, petitioner should be granted suspension of deportation.

Wherefore, Petitioner prays relief as follows:

1. That respondents, and each of them, be restrained and enjoined during the pendency of this action from taking the petitioner or causing petitioner to be taken into actual physical custody, and that respondents, and each of them, be restrained and enjoined during the pendency of this action from deporting petitioner or causing petitioner to be deported and that respondents, and each of them, be restrained and enjoined during the pendency of this action from removing the petitioner from the State of Oregon and the jurisdiction of this Court.

2. That this Court order and direct that petitioner be released from the physical custody of respondent Ernest Hover and respondent John P. Boyd, or either of them, and petitioner be enlarged upon such terms as shall be determined by this Court during the pendency of this action.

3. That this Court issue a Writ of Habeas Corpus permanently discharging petitioner from custody of any person or persons whomsoever, and especially from the custody of respondents John P. Boyd and Ernest Hover.

4. That this Court transfer the whole and entire record of said administrative deportation proceed-

ings from the file in Civil No. 7833 to the file in this case; and that the respondents be required to produce all written motions, applications, and other papers and requests filed in said proceedings since the denial of petition for writ of certiorari in the aforesaid case as hereinabove recited.

5. That this Court declare and adjudge:

(a) That the order of deportation contained in the written decision of the said Louis C. Hafferman hereinbefore referred to be declared null and void.

(b) That the orders contained in the written decisions signed by the said Thomas G. Finucane, as chairman of the Board of Immigration Appeals dated September 8, 1953 and March 26, 1958 be declared null and void.

(c) That all orders or directions of respondents or either of them ordering or directing the surrender of petitioner and for deportation of him be declared null and void.

(d) That petitioner did not receive a fair hearing.

(e) That there was no reasonable, substantive and probative evidence adduced in said administrative proceedings to support said orders of deportation.

(f) That the Act of October 16, 1918, as amended (Section 22 of the Internal Security Act of 1950) be declared void and unconstitutional as being in violation of the Fifth Amendment to the United States Constitution.

(g) That the Act of October 16, 1918, as amended (Section 22 of the Internal Security Act of 1950), insofar as they make past membership in the Communist Party of the United States grounds for deportation, be declared null and void:

(1) as being bills of attainder in violation of the United States Constitution, Article I, Section 9, Clause 3, or

(2) as being ex post facto laws, or

(3) in violation of the First and Fifth Amendments to the United States Constitution, in that such statutes abridge the right of freedom of speech of aliens, and particularly of this petitioner, and operate to deprive aliens, and particularly this petitioner, of liberty without due process of law.

6. That this Court restrain and enjoin respondents during the pendency of this action from taking petitioner into actual physical custody.

7. That this Court order, direct and declare that all pending deportation proceedings against petitioner are unlawful, null and void.

8. That, alternatively, suspension of deportation of petitioner be ordered by this Court.

9. That this Court grant such other, further, or different relief as may be found to be just, proper, equitable and meet in the premises.

PETERSON, POZZI & LENT, and
GERALD H. ROBINSON,
/s/ By GERALD H. ROBINSON,
Of Attorneys for Petitioner.

EXHIBIT "A"

U. S. Department of Justice
Board of Immigration Appeals

May 13, 1955

File: A-5085301

In re: Willia Niukkanen or William Niukkanen now known as William Albert Mackie.

In Deportation Proceedings—In Behalf of Respondent: Nels Peterson, Esquire, Loyalty Building, Portland 4, Oregon.

Charges: Warrant: Act of 1918—Member of Communist Party of the United States after entry.

Lodged: None.

Application: Suspension of deportation—Section 244 (a) (5), IAN Act.

Detention Status: Released under $2000 bond.

This case comes forward on appeal from an order entered by the Special Inquiry Officer on February 16, 1955, denying the respondent's application requesting that his deportation be suspending under the provisions of Section 244 (a) (5), Immigration and Nationality Act of 1952, and directing that he be deported from the United States pursuant to law on the charge stated in the warrant of arrest. On examination of the record we find that the warrant for the respondent's arrest was issued and served upon him on June 17 and September 12, 1952, respectively.

This case first came before this Board on September 8, 1953, at which time we dismissed the appeal from an order entered by the Special Inquiry

Exhibit "A"—(Continued)

Officer on June 30, 1953, directing that respondent be deported from the United States pursuant to law on the charge stated in the warrant of arrest.

Thereafter, on November 29, 1954, we denied counsel's motion requesting that the proceedings be reopened for the purpose of affording respondent an opportunity to apply for suspension of deportation under the Immigration and Nationality Act of 1952. In our decision of November 29, 1954, we affirmed our previous finding that respondent had been a voluntary member of the Communist Party of the United States from 1937 to 1939 and commented that he did not testify on the issue of membership in the Communist Party during the hearing conducted on the warrant of arrest.

When this case was last before us on December 23, 1954, we directed the withdrawal of the outstanding order and warrant of deportation and further directed that the hearing be reopened for the purpose of affording respondent an opportunity to apply for and prosecute an application for suspension of deportation under the provisions of Section 244 (a) (5) of the Immigration and Nationality Act of 1952.

Respondent, a 46-year-old married male, native and citizen of Finland, has resided continuously in the United States since his admission for permanent residence at Sault Ste. Marie, Michigan, on September 5, 1909. Respondent was lawfully married to a native-born citizen of the United States on June 24, 1945, at Portland, Oregon.

Exhibit "A"—(Continued)

During the hearings conducted under the warrant of arrest on May 11 and May 21, 1953, two Government witnesses testified that the respondent was a voluntary member of the Communist Party of the United States from 1937 to 1939. These witnesses each testified that they had seen the respondent pay Communist Party dues. Likewise, testimony of the witness Wilmot revealed that the respondent attended closed meetings of the Communist Party in Portland, Oregon, and in Aberdeen, Washington. The record shows that the other Government witness Knipe testified untruthfully during the aforementioned hearing concerning his record of convictions, thereby lessening his credibility as a witness. However, testimony of the witness Knipe as to respondent's membership in the Communist Party, Portland Section, is corroborated by the Government witness Wilmot, who has been a credible and truthworthy witness in this proceeding.

The respondent did not testify during the aforementioned hearings on the issue of whether he had or had not been a member of the Communist Party of the United States. During the original hearings he was afforded an opportunity to make application for discretionary relief but failed to do so. The evidence of record clearly establishes that respondent is subject to deportation on the charge stated in the warrant issued for his arrest on June 17, 1952.

The respondent testified during the reopened

Exhibit "A"—(Continued)

hearings conducted at Portland, Oregon, on February 2 and 3, 1955, that he was a member of the Workers Alliance for approximately two years prior to his departure for Eastern Oregon during the year 1939. The Workers Alliance is an organization noted in the list prepared by the Attorney General, after appropriate investigation and determination, as a Communist Party affiliate. It was so designated as such on May 27, 1948, and the information with respect thereto was disseminated on June 1, 1948. (13 F.R. 3067.)

The respondent's citizen wife and his mother testified during the reopened hearing that they had never known or heard respondent talk about or discuss Communism. It is conceded that his deportation would result in serious economic detriment to his citizen spouse and her minor citizen child, issue of a prior marriage. Likewise, it is conceded that no evidence has been produced to show that the respondent has been a member of the Communist Party since leaving Portland, Oregon, for Eastern Oregon, during the year 1939. However, the testimony during the reopened hearing was evasive and unresponsive with respect to his activities both prior and subsequent to 1940. Under the applicable regulations the respondent has the burden of establishing that he meets the statutory requirements for the relief of suspension of deportation (8 CFR 242.54 (d)).

Respondent testified that he attended meetings in the Finnish Hall in the Albina section of Port-

Exhibit "A"—(Continued)

land, Oregon, but did not know whether they were Communist Party meetings or not and that perhaps there were Communists present at these meetings. When asked if there were Communists present, he answered "Maybe there were Communists there and maybe there wasn't." Notwithstanding the testimony of the two witnesses who appeared on behalf of the Government during the original hearing conducted under the warrant of arrest, and his own testimony in this proceeding that he was a member of the Workers Alliance, the respondent testified that he had never knowingly been a member of the Communist Party of the United States or of any branch, affiliate or organization of the Communist Party of the United States. He further testified that he did not knowingly at any time in his life become a member or affiliated with the Communist Party of the United States. When asked if he recalled who was present at the turkey dinner meeting of the Oregon Committee for the Protection of the Foreign Born, held in the Finn hall in November, 1954, he answered, "Do I have to answer that? * * * And make a person think I'm trying to get as a stool pigeon. That is one thing I don't want to do."

The remaining facts in this case have been heretofore fully covered by the Special Inquiry Officer and need no further discussion herein.

Counsel's assertion that there is no legal, reasonable or proper grounds for the Special Inquiry Officer's denial of respondent's application request-

Exhibit "A"—(Continued)

ing that his deportation be suspended under the provisions of Section 244 (a) (5) of the Immigration and Nationality Act of 1952, is without merit. The evidence of record clearly establishes that the respondent was a member of the Communist Party from 1937 until his departure from Portland, Oregon, to Eastern Oregon in 1939. During the reopened hearing he testified that he was a member of a group that was probably the Workers Alliance, an organization *designed* by the Attorney General of the United States as being Communist.

As hereinbefore stated, the respondent's testimony during the reopened hearing was evasive and unresponsive to most, if not all, of the questions asked of him with respect to the Communist Party and his being a member thereof. He refused to name the six, eight or maybe ten persons that were present at the Turkey Dinner meeting of the Oregon Committee for the Protection of Foreign Born held at the Finnish hall in November, 1954. While it has not been established that this latter organization is Communist or an affiliate of the Communist Party, the respondent steadfastly refused to name the persons that were present at that meeting. Likewise, the respondent failed to submit any evidence showing that he is actively opposed to the doctrines and teachings of the Communist Party. While the respondent's answers to questions concerning his activities both prior and subsequent to 1940 as well as the meetings attended by him are for the most part vague and unrespon-

Exhibit "A"—(Continued)

sive, it is noted that his recollection of places, persons and events prior to 1930 is good.

After carefully considering all the evidence of record together with the exceptions noted by counsel on appeal, we find nothing therein that warrants any change being made in the decision of the Special Inquiry Officer who has denied respondent's application requesting that his deportation be suspended under the provisions of Section 244 (a) (5), Immigration and Nationality Act, and has directed that he be deported from the United States pursuant to law on the charge stated in the warrant of arrest. The evidence of record, which is based primarily upon the testimony of the respondent, does not establish that he, the respondent, has completely severed his connection with the Communist Party of the United States and that he is no longer sympathetic to its aims or principles. There is an overwhelming amount of evidence to show that respondent was a member of the Communist Party of the United States from 1937 until early in the year 1939. There is nothing in the record to show that respondent has completely disassociated himself with the Communist Party and that he no longer believes in its doctrines or principles. For the reasons hereinbefore set forth, the following order will be entered.

Order: It is ordered that the appeal be dismissed.

Chairman.

[Endorsed]: Filed April 4, 1958.

[Title of District Court and Cause.]

WRIT OF HABEAS CORPUS

To: Ernest Hover, the above named respondent, Greeting:

We command you that you have the body of Willia Niukkanen, also known as William Niukkanen, also known as William Albert Mackie, by you imprisoned and detained, as it is alleged, together with the time and cause of such imprisonment and detention, before this Court, at the Courtroom thereof, in the United States Courthouse, in the City of Portland, County of Multnomah, and State of Oregon, on the 10th day of April, 1958, at the hour of 10:00 o'clock A.M., to do and receive that which shall then and there be considered concerning the said Willia Niukkanen, also known as William Ninkkanen, also known as William Albert Mackie, and have you then and there this Writ.

Witness My hand this 4th day of April, 1958.

s/ GUS J. SOLOMON,
United States District Judge.

[Endorsed]: Filed April 4, 1958.

[Title of District Court and Cause.]

RULE TO SHOW CAUSE

Upon consideration of the petition of Willia Niukkanen, also known as William Niukkanen, also known as William Albert Mackie, the Court

hereby orders the respondents to show cause why they should not be restrained from taking any action pursuant to the order of deportation of the petitioner and any warrant issued pursuant thereto, pending final determination by this Court of the above entitled action.

Pending the hearing upon this rule to show cause, it appearing to the Court that great and irreparable injury may be done the petitioner if any action is taken under said order and warrant of deportation, and it further appearing that respondents will in no wise be injured thereby, respondents are hereby stayed and restrained from taking any action on said order of warrant of deportation against petitioner.

This Rule to Show Cause is hereby made returnable before the Honorable Judges of the United States District Court for the District of Oregon, on the 10th day of April, 1958, at 10:00 o'clock A.M., in the United States Courthouse in the City of Portland, Oregon.

Dated This 4th day of April, 1958.

/s/ GUS J. SOLOMON,
United States District Judge.

[Endorsed]: Filed April 4, 1958.

[Title of District Court and Cause.]

MOTION

Comes Now Petitioner, by and through his attorneys Nels Peterson and Gerald H. Robinson,

and respectfully moves the Court for an Order requiring Respondents to produce into Court and make available for inspection by Petitioner and his counsel the complete report of the Federal Bureau of Investigation of the Department of Justice of the United States of America concerning petitioner's alleged affiliations with the Communist Party of the United States.

The foregoing motion is based upon Rule 34 of the Federal Rules of Civil Procedure and the rulings of the United States Supreme Court (especially the case of Jencks v. U. S.). The motion is also based upon the fact that the evidence produced at prior hearings with respect to Petitioner's alleged Communist associations resulted from various FBI investigations and reports, which Petitioner believes contain information, data, names of witnesses and reports which will tend to prove that Petitioner was not a member of the Communist Party so as to be a deportable alien. That unless such information is made available to Petitioner and his attorneys, Petitioner's substantive and procedural rights will be imperiled.

NELS PETERSON,
GERALD H. ROBINSON,
/s/ By GERALD H. ROBINSON,
Attorneys for Petitioner.

Affidavit of Mailing Attached.

[Endorsed]: Filed April 7, 1958.

[Title of District Court and Cause.]

RETURN TO THE RULE TO SHOW CAUSE AND PETITION FOR WRIT OF HABEAS CORPUS AND ANSWER TO COMPLAINT FOR INJUNCTIVE RELIEF TO PREVENT AGENCY ACTION

Comes now Respondent Ernest Hover, District Director, Immigration and Naturalization Service, United States Department of Justice, erroneously named by the Petitioner herein as "Officer in Charge, Immigration and Naturalization Service, at Portland, Oregon" by and through C. E. Luckey, United States Attorney for the District of Oregon, and for return to the petition for writ of habeas corpus and for answer to the complaint for injunctive relief to prevent agency action, admits, denies and alleges as follows:

1. Answering paragraphs I, II, VI, VII, VIII and XIX (XVIV) Respondent Ernest J. Hover admits the same.

2. Answering paragraph V Respondent Ernest J. Hover admits the same but alleges that the hearing referred to therein was valid in all respect and not a "purported" hearing as alleged therein.

3. Answering paragraphs XIII, XV, XVI, XVII, XVIII and XX Respondent Ernest J. Hover denies the same.

4. Answering paragraph III thereof Respondent

Ernest J. Hover alleges that he is the District Director of Immigration and Naturalization, Portland, Oregon, and a citizen of the United States and as such is in charge of the Office of the Immigration and Naturalization Service of the United States Department of Justice in the city of Portland, Oregon, but denies the remaining allegations of said paragraph III.

5. Answering paragraph IV thereof Respondent Ernest J. Hover admits that the Petitioner resides at 4326 North Montana Street, Portland, Oregon.

6. Answering paragraph IX thereof Respondent Ernest J. Hover admits that after December 16, 1957, Petitioner filed a motion for a new hearing with the United States Department of Justice, Board of Immigration Appeals, on the grounds that on the 9th day of December, 1957, the said Board of Immigration Appeals did render an opinion through its Chairman, Thomas G. Finucane, which decision states, among other things, as follows:

"It Is Ordered that the motion be and the same is hereby denied"; but said Respondent denies each and every other allegation contained therein.

7. Answering paragraph X thereof Respondent Ernest J. Hover admits that he has indicated his intention to cause the Petitioner to be taken into custody and be deported from the United States.

8. Answering paragraph XI thereof Respondent Ernest J. Hover admits Petitioner has ex-

hausted his administrative remedy but denies each and every other allegation contained therein.

9. Answering paragraph XII thereof Respondent Ernest J. Hover alleges that he will produce at the hearing in this cause the entire certified record of the proceedings before the said Louis C. Hafferman, Roy J. Norene and the Board of Immigration Appeals for review thereof by the Court.

And for a further and separate answer and defense comes now the Respondent Ernest J. Hover and alleges that the only new assertion after the disposition of the similar proceedings between the same parties or their predecessors in Civil No. 7833 in this district is that the subsequent decision of the United States Supreme Court in the case of Rowoldt v. Perfetto, 355 U.S. 115, which decision it is alleged so redefined the substantial and evidential requirements of membership in the Communist Party of the United States as to take petitioner out of a class of deportable aliens under the Immigration & Naturalization Act, has been decided.

2. That the same assertion was made before the Board of Immigration Appeals by the petitioner in his petition to the Board of Immigration of Appeals to reopen the case and the proceedings for reconsideration of the issue of deportability, which motion for reopening the Board of Immigration Appeals denied, reciting in the order denying the motion that "careful consideration of

the entire record revealed an overwhelming amount of evidence showing that the respondent was a member of the Communist Party of the United States from 1937 until early in the year 1939, and that such membership on his part was a meaningful association and one which was not wholly devoid of political implications. That this is the precise test of deportability laid down by the Supreme Court in the case of Rowoldt v. Perfetto, supra. In addition, eight days after considering that case, the Supreme Court refused to review the deportation case of this respondent. (Niukkanen v. Boyd, cert. den. 12/16/57; 2 L. Ed 2d 259)."

3. That said finding is based upon substantial evidence and was not arbitrary and capricious but in accordance with law and not contrary to the Constitutional rights, privileges and immunities of the petitioner.

Wherefore answering respondent having fully answered the allegations of the petition and complaint herein and having made a full and adequate return pursuant to the order of This Honorable Court, prays that the Petition for Writ of Habeas Corpus and the Complaint for Injunctive Relief to Prevent Agency Action herein be dismissed and held for nought and that the Rule to Show Cause heretofore issued by This Honorable Court be discharged and that the petitioner be remanded to the custody of Ernest J. Hover, District Director

of Immigration & Naturalization Service at Portland, Oregon, for deportation.

/s/ ERNEST J. HOVER,
District Director, U. S. Immigration & Naturalization Service Department of Justice.

/s/ C. E. LUCKEY,
United States Attorney for the District of Oregon.

Duly Verified.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed April 9, 1958.

[Title of District Court and Cause.]

MOTION THAT PETITIONER'S MOTION FOR ORDER REQUIRING PRODUCTION OF DOCUMENTS BE DENIED

Comes now the Respondent, Ernest J. Hover, District Director, Immigration and Naturalization Service, United States Department of Justice, erroneously named by the Petitioner as "Officer in Charge, Immigration and Naturalization Service, at Portland, Oregon" by and through C. E. Luckey, United States Attorney for the District of Oregon, and respectfully moves the Court that Petitioner's motion for an order requiring Respondent to produce into court and to make available for inspection by Petitioner and his counsel the complete report of the Federal Bureau of Investigation of the Department of Justice of the United States

of America concerning the Petitioner's alleged affiliations with the Communist Party of the United States be denied because:

1. The record of agency actions challenged herein and the record before the special inquiry officer and before the Board of Immigration Appeals certified herein and before this Court contains no reference to any information from reports of the Federal Bureau of Investigation with the exception of the inquiry of the Federal Bureau of Investigation and the report of that agency concerning any prior criminal record of the Petitioner which inquiry and report are exhibits in the file and contained therein and the validity of the proceedings stands on the record contained in such file and therefore said records of the Federal Bureau of Investigation, if any, are irrelevant and incompetent in this proceeding.

2. Said records, if any, are not admissible in this proceeding. No witness in these proceedings before the special inquiry officer nor the Board of Immigration Appeals is claimed to have nor was asked if he had made any statement to any FBI agent or report to the FBI during the proceedings. The Petitioner is not entitled to rummage at will through the files of the Federal Bureau of Investigation. Petitioner is not entitled to investigative data, information, names of witnesses, etc., if any, of the Federal Bureau of Investigation.

3. Such motion is not timely there being no basis therefor based upon the administrative pro-

ceedings and no request or demand having been made therefor during the pendency of such proceedings.

Respectfully submitted,

/s/ C. E. LUCKEY,
United States Attorney.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed April 9, 1958.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

Comes now the respondent, Ernest J. Hover, District Director, Immigration and Naturalization Service, United States Department of Justice, erroneously named herein as "Officer in Charge, Immigration and Naturalization Service Office, United States Department of Justice at Portland, Oregon", and respectfully moves the above-entitled Court for summary judgment of dismissal of petitioner's Petition for Writ of Habeas Corpus and the Complaint for Injunctive Relief to Prevent Agency Action under Rule 56 of the Federal Rules of Civil Procedure on the grounds that the pleadings and the certified copy of the Immigration and Naturalization file tendered into Court herein show that the respondent is entitled to judgment as a matter of law in that the record of deportation proceedings shows that the petitioner has been accorded a full and fair hearing according to law

on the issue of his deportability, the issue now before the Court, and that said records demonstrate that the Petition for Writ of Habeas Corpus should be denied and the Complaint for Injunctive Relief to Prevent Agency Action and the cause herein set forth should be dismissed as a matter of law.

/s/ C. E. LUCKEY,
United States Attorney for the
District of Oregon.

Memorandum In Support of Motion
For Summary Judgment

1. Summary Judgment is appropriate where the only evidence for consideration is the record before the Immigration and Naturalization Service and the Board of Immigration Appeals for the Attorney General, which officials took the administrative action complained of by the petitioner. Chow v. Shaughnessy and Louie v. Shaughnessy, 151 F. Supp. 23 (S.D. N.Y., 1957). Gongalvez-Rosa v. Shaughnessy, 151 F. Supp. 906 (S.D. N.Y., 1957). Diogi v. Zimmerman, E.D. Penn. No. 16680, Civil, 1956.

2. The scope of judicial review is limited. U. S. ex rel Adel v. Shaughnessy, 183 F. 2d 371. (2 Cir., 1950). Fougerouse v. Boyd, et al., USDC, Oregon, Civil Nos. 7328 and 7331, decided January 27, 1958.

/s/ C. E. LUCKEY,
United States Attorney.

Affidavit of Service by Mail Attached.
[Endorsed]: Filed April 9, 1958.

In the United States District Court
for the District of Oregon

Civil No. 9741

WILLIA NIUKKANEN, also known as WILLIAM NIUKKANEN, also known as WILLIAM ALBERT MACKIE, Petitioner,

vs.

JOHN P. BOYD, District Director, Immigration and Naturalization Service, United States Department of Justice, and ERNEST HOVER, Officer in Charge, Immigration and Naturalization Service Office, United States Department of Justice, at Portland, Oregon,

Respondents.

ORDER

This matter came on for hearing April 10, 1958, upon the petition for writ of habeas corpus and complaint for injunctive relief to prevent agency action. The Court having heard the arguments of counsel and considered the evidence introduced and being fully advised in the premises it is

Ordered:

1. That the petition for writ of habeas corpus and complaint for injunctive relief to prevent agency action is hereby dismissed on the merits.

2. That the writ of habeas corpus heretofore issued is hereby discharged.

3. That the petitioner is hereby remanded to the

custody of Ernest Hover, District Director of the United States Department of Justice, Immigration and Naturalization Service, Portland, Oregon, to be held for deportation pursuant to the warrant and order of deportation previously issued.

Dated at Portland, Oregon, this 14th day of April, 1958.

/s/ GUS J. SOLOMON,
Judge.

[Endorsed]: Filed April 14, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Willia Niukkanen, also known as William Niukkanen, also known as William Albert Mackie, petitioner in the above entitled cause, hereby gives Notice of Appeal to the United States Court of Appeals for the Ninth Circuit from a certain order made on the 14th day of April, 1958, by the Honorable Gus J. Solomon, Judge of the United States District Court for the District of Oregon, dismissing petitioner's petition for a writ of Habeas Corpus and Injunctive Relief, discharging the Writ of Habeas Corpus theretofore issued, and remanding petitioner to Ernest Hover, District Director, Immigration and Naturalization Service, United States Department of Justice, Portland, Oregon, for deportation to Finland, pursuant to the Warrant of Arrest and Order of Deportation of said Service.

Dated this 10th day of April, 1958.

PETERSON, POZZI & LENT,
NELS PETERSON and
GERALD H. ROBINSON,
/s/ By NELS PETERSON,
Attorneys for Petitioner.

Acknowledgment of Service Attached.

[Endorsed]: Filed April 14, 1958.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Whereas, Willia Niukkanen, also known as William Niukkanen, also known as William Albert Mackie, petitioner in the above entitled suit, appeals to the United States Court of Appeals for the Ninth Circuit from an order dismissing petitioner's petition for Writ of Habeas Corpus and Injunctive Relief, discharging the Writ of Habeas Corpus theretofore issued, and remanding petitioner to Ernest Hover, District Director, Immigration and Naturalization Service, United States Department of Justice, Portland, Oregon, for deportation to Finland, pursuant to the Warrant of Arrest and Order of Deportation of said Service, entered on the 14th day of April, 1958, by Gus J. Solomon, Judge of the United States District Court for the District of Oregon, and from the whole thereof.

Now, Therefore, in consideration of the premises, and of such appeal, we, Willia Niukkanen, also

known as William Niukkanen, also known as William Albert Mackie, as principal, and the Fidelity and Deposit Company of Maryland, a corporation organized under the laws of the State of Maryland and duly authorized to transact a surety business in the State of Oregon, as surety, do hereby jointly and severally undertake and promise on the part of said petitioner, Willia Niukkanen, also known as William Niukkanen, also known as William Albert Mackie, that said petitioner will pay all court costs and disbursements which may be awarded against him on said appeal, but not to exceed the sum of Two Hundred Fifty and no/100 ($250.00) Dollars.

Dated this 10th day of April, 1958.

/s/ WILLIA NIUKKANEN,
/s/ WILLIAM NIUKKANEN,
/s/ WILLIAM ALBERT MACKIE,
Principal.

[Seal] FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
/s/ By VANCE McKENNEY,
Attorney-in-Fact and Resident Agent,
Surety.

Acknowledgment of Service Attached.

[Endorsed]: Filed April 14, 1958.

[Title of District Court and Cause.]

AFFIDAVIT

State of Oregon,
County of Multnomah—ss.

I, Gordon Griffiths, being first duly sworn on oath, depose and say:

That I am an official Court reporter for the United States District Court for the District of Oregon; that I reported the proceedings in Willia Niukkanen, etc., vs. John P. Boyd, et al., civil number 9,741 in the aforesaid Court; that because of previous commitments for the production of transcripts of testimony in earlier cases, which cases have been given priority by the United States District Court, I am unable to complete the transcript in the aforesaid case prior to the middle of June, 1958, that is approximately June 15, 1958.

s/ GORDON GRIFFITHS.

Subscribed and sworn to before me this 19th day of May, 1958.

[Seal] s/ GERALD H. ROBINSON,
Notary Public for Oregon. My
Commission expires 3-3-61.

[Endorsed]: Filed May 20, 1958.

[Title of District Court and Cause.]

ORDER

Upon motion of plaintiff and good cause appearing therefor,

It Is Hereby Ordered that the time in which petitioner-appellant may docket his appeal in the United States Court of Appeals for the Ninth Circuit is hereby extended to and including the 26th day of May, 1958.

Dated this 19th day of May, 1958.

/s/ GUS J. SOLOMON,
U. S. District Court Judge.

[Endorsed]: Filed May 20, 1958.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated and Agreed by and between Gerald H. Robinson, of counsel for petitioner, and C. E. Luckey, United States Attorney, of counsel for respondents, that the original exhibits admitted into evidence at the hearing in the above entitled cause be transmitted by the Clerk of this Court to the United States Court of Appeals for the Ninth Circuit.

Dated this 19th day of May, 1958.

/s/ GERALD H. ROBINSON,
Of Counsel for Petitioner.

/s/ C. E. LUCKEY,

Of Counsel for Respondent,
Ernest J. Hover.

[Endorsed]: Filed May 20, 1958.

[Title of District Court and Cause.]

ORDER

On motion of petitioner, supported by stipulation between attorney for petitioner and the United States Attorney, and it appearing to the Court that there is good cause therefor:

It Is Hereby Ordered that the original exhibits admitted into evidence at the hearing in the above entitled case be transmitted to the United States Court of Appeals for the Ninth Circuit by the Clerk of this Court.

Dated this 19th day of May, 1958.

/s/ GUS J. SOLOMON,
United States District Judge.

[Endorsed]: Filed May 20, 1958.

[Title of District Court and Cause.]

DOCKET ENTRIES

1958

Apr. 4—Filed Petition for Writ of Habeas Corpus and Complaint for Injunctive Relief (No Summons Issued).

Apr. 4—Filed Writ of Habeas Corpus, fixing date of April 10, 1958, at 10:00 a.m.

1958

Apr. 4—Filed Rule to Show Cause, fixing hearing April 10, 1958, at 10:00 a.m.

Apr. 7—Filed Petitioner's Motion to require respondents to produce record for inspection.

Apr. 9—Filed respondents' Motion for Summary Judgment.

Apr. 9—Filed respondents' Return to Rule to Show Cause and Petition for Writ of Habeas Corpus and Answer to complaint for Injunctive relief to prevent agency action.

Apr. 9—Filed respondents' Motion that Petitioner's Motion for Order Requiring Production of Documents be denied.

Apr. 10—Record of hearing on Order to Show Cause why defts. should not be restrained from deporting petitioner; evidence adduced; Record of hearing upon Motion of Petitioner to require United States to produce records; Entered Order denying Motion to produce records; Record of hearing upon motion to require United States to produce witnesses; Entered Order denying Motion to produce witnesses; Record of Oral motion to quash order of deportation, etc.; Entered Order denying Motion to quash order of deportation File of Immigration Office received in evidence.

1958

Apr. 14—Record of hearing on entry of judgment order.

Apr. 14—Filed and entered order dismissing petition for writ of habeas corpus and dismissing complaint for injunctive relief; Order discharging writ heretofore issued and remanding petitioner to custody of Immigration and Naturalization Service.

Apr. 14—Filed Notice of Appeal by plaintiff (served).

Apr. 14—Filed Bond for costs on appeal.

Apr. 16—Filed Partial Transcript of Proceedings.

Apr. 24—Filed and Entered Order Staying Deportation and setting bail in sum $2,000.00 (Court of Appeals).

Apr. 25—Filed. Designation of Record on Appeal by appellant.

Apr. 25—Mailed Bond to Stay Deportation to Court of Appeals.

Apr. 28—Filed appellee's designation of additional record on appeal.

Apr. 30—Filed appellant's amended designation of record on appeal.

May 20—Filed affidavit of Gordon Griffiths re time for docketing appeal.

May 20—Filed and entered order extending time to May 26, 1958 to docket appeal.

May 20—Filed stipulation re transmittal of exhibits to Court of Appeals.

May 20—Filed and entered order to forward exhibits to Court of Appeals.

1958

May 21—Filed reporter's transcript of proceedings of April 10 and 14, 1958 (in duplicate).

May 22—Mailed record to Court of Appeals, including reporter's transcript and Exhibit 1.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Petition for writ of habeas corpus and complaint for injunctive relief to prevent agency action; Writ of habeas corpus; Rule to show cause; Motion by petitioner to require respondents to produce Federal Bureau of Investigation reports; Return to the rule to show cause, etc.; Motion that petitioner's motion for order requiring production of documents be denied; Respondents' motion for summary judgment with memorandum attached; Judgment order; Notice of appeal; Bond for costs on appeal; Designation of record on appeal by appellant; Designation of additional record on appeal by appellees; Amended designation of record on appeal by appellant; Affidavit of Gordon Griffiths, Court Reporter re extension of time; Order allowing appellant to and including May 26, 1958 to docket appeal; Stipulation re forwarding exhibits to Court of Appeals; Order to

transmit exhibits to Court of Appeals; and Transcript of docket entries constitute the record on appeal from a judgment of said Court in a cause therein numbered Civil 9741, in which Willia Niukkanen, etc. is the petitioner and appellant and John P. Boyd, District Director, Immigration and Naturalization Service, United States Department of Justice, et al. are the respondents and appellees; that the said record has been prepared by me in accordance with the designations of contents of record on appeal filed by the appellant and appellees, and in accordance with the rules of this court.

I further certify that there is enclosed herewith Exhibit No. 1, and the reporter's transcript of proceedings of April 10 and 14, 1958. The bond to stay deportation was mailed to the Court of Appeals on April 25, 1958.

I further certify that the cost of filing the notice of appeal, $5.00 has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District this 22nd day of May, 1958.

[Seal] R. DE MOTT,
Clerk,

/s/ By THORA LUND,
Deputy.

United States District Court
District of Oregon

Civil No. 9741

WILLIA NIUKKANEN, also known as WILLIAM NIUKKANEN, also known as WILLIAM ALBERT MACKIE, Petitioner,

vs.

JOHN P. BOYD, District Director, Immigration and Naturalization Service, United States Department of Justice, and ERNEST HOVER, Officer in Charge, Immigration and Naturalization Service Office, United States Department of Justice, at Portland, Oregon, Respondent.

TRANSCRIPT OF PROCEEDINGS

Portland, Oregon, April 10, 1958, 10:00 a.m.

Before: Honorable Gus J. Solomon, District Judge.

Appearances: Mr. Frank Pozzi and Mr. Gerald H. Robinson, of Attorneys for Petitioner; Mr. C. E. Luckey, United States District Attorney, appearing in behalf of the Respondents.

Court Reporter: Mr. Gordon R. Griffiths. [1]*

The Court: We will hear the case of Niukkanen vs. Boyd.

Mr. Robinson: Your Honor, I have served on me this morning by mail a motion that the Petitioner's

* Page numbers appearing at top of page of Reporter's Transcript of Record.

motion, that an order requiring the production of certain documents of the FBI filed in this case be denied. I am not sure what the effect of this motion, subpoena and motion is, and I assume the Court will want to discuss these preliminaries first.

The Court: Go ahead. What is the theory of your case here?

Mr. Robinson: The theory of the case or the motion?

The Court: Of the case.

Mr. Robinson: Of the case; the situation is this, your Honor: The Petitioner in 1952 was arrested on an order and warrant of deportation after hearings were held in connection with the allegation that during the years 1937, 1938 and 1939 he was a member of the Communist Party, and as an alien he was therefore subject to deportation. The hearing was affirmed; the results of this hearing were affirmed by the Board of Immigration Appeals, and application for suspension of deportation was denied, and this was also affirmed by the Board of Immigration Appeals, and a couple of years ago the Petitioner filed a petition for writ of habeas corpus in this court, which your Honor heard. The petition was denied, and the case has been appealed to the United States Court of Appeals, where it [2] was affirmed, and to the United States Supreme Court, where certiorari was denied last December.

Between the time of this Court's judgment and, as a matter of fact, between the time of the Court of Appeals' judgment and the denial of certiorari, the United States Supreme Court handed down its

decision in the case of Rowoldt vs. Perfetto which, we believe, substantially re-defines both the evidential and substantive requirements of proof of sufficient meaningful association of an alien with the Communist Party to make him deportable, and we have applied for a new hearing.

The Court: Where?

Mr. Robinson: With the Board of Immigration Appeals. This was timely filed. As soon as the Supreme Court's action in denying our petition for a writ was received, we filed this motion with the Board of Immigration Appeals. Thereafter, the Board of Immigration Appeals refused to give us a new hearing on this issue, and the Petitioner was then notified to report for deportation. We have filed this writ, and the day after we filed this writ we have filed a motion to require the Government to produce the FBI report in this case, and we are particularly interested in those made by the two witnesses who testified against the Petitioner at the hearings in this case, Robert Wilmot and a Lee Knipe. These two witnesses are the only witnesses which the Government produced at that [3] original hearing, and it is our contention that under the circumstances the Petitioner is entitled to hear whatever reports these people made to the FBI, to impeach their testimony as given at those original hearings, and also for the use in developing the Petitioner's association with the Communist Party, if it be proved and if it be granted, for the sake of argument, was not of the meaningful variety and did not——

The Court: The Petitioner denied that he ever was a member of the Communist Party.

Mr. Robinson: That's right; and in the alternative we have made that contention, that if the Government's evidence be taken at face value, nevertheless it does not indicate the type of meaningful association that is required by the Rowoldt case.

The Court: I do not understand the theory upon which you are coming in. In other words, does the law provide that a new hearing should be held, or are you trying this case on the record that was made?

Mr. Robinson: We believe that the law requires that a new hearing should be held.

The Court: Give me a case.

Mr. Robinson: We found no authority.

The Court: I read the Rowoldt case. It is not in point on this, and another thing: Two weeks before this certiorari [4] was denied in this case the Rowoldt decision came down. The Supreme Court knew about the Rowoldt case.

Mr. Robinson: It is my understanding, your Honor, that the denial of certiorari is not a ruling on the merits of the case; that it can be denied for a great many reasons, and one of them may have been that the Supreme Court believed that this case should be handled at the administrative level, the Board of Immigration Appeals.

The Court: They didn't say so, did they?

Mr. Robinson: No, but that would logically follow.

The Court: This is a petition for habeas corpus

on the ground of capricious action on the part of the Board?

Mr. Robinson: That is true.

The Court: Mr. Wilmot and Mr. Knipe testified some three or four years ago. Under the Jencks case—and I have interpreted the Jencks case more broadly than any other District Judge in America—there is no provision for the taking of testimony.

Mr. Robinson: I read your opinion, your Honor.

The Court: Yes; and this case goes far beyond anything that I ever decided. In the conscientious objector case I required the Government to bring in the evidence, and I dismissed the case because they refused to do it.

Mr. Robinson: Yes, I understand.

The Court: But in this case three years after [5] the man testifies you are asking that the Government produce evidence.

Mr. Robinson: Well, the Jencks case was not decided at the time of the hearing. There was no—the rule at the time of this hearing was completely different, and the counsel that handled it at that time exercised his full rights that were known to him.

The Court: I don't think that is true. I don't think that the Jencks case by the Supreme Court changed this very much. We have always required in this court where this man had his hearings that whenever the Government produced a witness who had made a written statement that statement was available to counsel for defendant for the purposes of impeachment. This is not a different rule. Mackie had every remedy available to him all the time in

this court, and just because he did not exercise it, now all these years later he cannot come in and ask for it.

Mr. Robinson: There is one further point that impinges on that situation, your Honor, though, and that is that the Rowoldt case laid down new law on the criterion for membership in the Communist Party as a basis of deportation. I am sure that your Honor is familiar with the case. Rowoldt himself admitted that he was a member.

The Court: Yes, he came in clean. He came into court and testified that he had been a member of the Communist Party. [6]

Mr. Robinson: That's right.

The Court: And had done all these things. Now, Mackie was offered the same opportunity of admitting membership and coming under the same rule on the ten-year period that he had not participated. He refused that offer.

Mr. Robinson: The Rowoldt case was not on suspension of deportation, your Honor. It was on the question of membership as a basis of party——

The Court: I am going to deny your motion that the Government produce those reports until and unless the Government offers these witnesses at this hearing.

Mr. Robinson: Well, then, we would make one further motion in connection with that. May I make one point before we make this motion, your Honor, that you have indicated that Mr. Mackie could have come in and admitted membership in the Communist Party. We know that he could have, but he did

not because he was not a member. He did not care to lie under oath that he was. He was offered by the Immigration people leniency and clemency if he would testify the way they wanted him to.

The Court: Well, that does not show in the record, and there is nothing like that. I have read the entire record over here, but I want to say this, that therein is the big distinction between Rowoldt and Mackie.

Mr. Robinson: I don't think it is, your Honor. Rowoldt [7] is a stronger case for deportation than Mr. Mackie because it seems to me, in reading the Rowoldt case, that the essence of the Court's opinion is that mere membership is not sufficient for deportation; that it requires what the Court—the Court uses the words "meaningful association."

The Court: I read the case. The motion is denied. Put on your witness. I am going to let you do one thing. I do not think you are entitled to put on any evidence, but I am going to permit you to put Mr. Mackie on.

Mr. Robinson: I have a couple more motions, if I may, at this time, your Honor?

The Court: All right; go ahead.

Mr. Robinson: First, in view of the Court's ruling on our motion to produce the FBI report, we would like to lay a foundation, and so, therefore, we move that the Government be required to bring Mr. Wilmot and Mr. Knipe into court to testify as to whether or not they made FBI reports and be subject to cross examination with respect to them.

The Court: The motion is denied.

Mr. Robinson: Then, further, your Honor, we would move that the warrant of deportation be quashed and that this writ, petition, be granted.

The Court: The motion is denied.

Mr. Robinson: May I state my grounds for the record?

The Court: You can state your grounds at a subsequent [8] time.

Mr. Robinson: Very well.

The Court: I will let you make your full record. Call your witness.

WILLIAM ALBERT MACKIE

Petitioner, called in his own behalf, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Robinson): Would you state your name, please? A. William Albert Mackie.

Q. Are you also known by other names?

A. No, I am not.

Q. Are you—*in* your name in Finnish Willia Niukkanen? A. Yes.

Q. You are generally known in this country as William Mackie; is that correct? A. Yes.

Q. Where do you live, Mr. Mackie?

A. 4326 North Montana.

Q. How long have you lived there? [9]

A. Oh, 12 years, 13 years.

Q. Where did you live before that?

A. 3820 North Gantenbein.

Q. How long did you live there?

(Testimony of William Albert Mackie.)

A. Oh, 14 years.

Q. How long have you been a resident of the State of Oregon? A. Oh, 37 years.

Q. Do you have parents and family living in Portland? A. One, my father, is living.

Q. And your mother?

A. She died about a year ago, year and a half.

Q. Is your father—how old is your father?

A. 79.

Q. Is he employed? A. Yes.

Q. In what capacity?

A. He is a tailor.

Q. How long does he work?

A. Well, he works the full week.

The Court: Mr. Robinson, all of this is in his testimony for mitigation and for suspension. Now; I thought you had something that pertained to the Rowoldt case.

Mr. Robinson: I am getting to it, your Honor.

Q. Mr. Mackie, are you a citizen of the United States? A. No. [10]

Q. When did you come to the United States?

A. 1909.

Q. Have you been living in this country continuously since that time? A. Yes.

Q. Since your entry into the United States have you or have you not ever been a member of the Communist Party of the United States?

A. No.

Q. Have you been arrested on a warrant of deportation? A. Yes.

(Testimony of William Albert Mackie.)

Q. Subsequent to that warrant, did you attend a hearing on the issue of whether or not you were a member of the Communist Party of the United States held by the Immigration Service?

A. I don't understand the question.

Q. Did you attend a hearing? A. Yes.

Q. Before the Immigration Service; is that it?

A. Yes, sir.

Q. Very well. Was one of the witnesses at that hearing a man named Wilmot? A. Yes.

Q. You were present during his testimony at that time? A. I was.

Q. At that hearing, on Page 13 of the transcript of that [11] hearing, Mr. Wilmot was asked whether or not he knew you, and he testified that he did know you. Mr. Mackie, had you ever seen Robert Wilmot prior to that hearing?

A. I never saw him. I don't know the man.

Q. Have you ever seen him since that hearing?

A. No.

Q. On Page 14 of that hearing Mr. Wilmot testified that he met you at the home of a person named Helme Burns, who was the Secretary of the Labor New Dealer, which was a newspaper published in Portland, Oregon, during the '30's. Do you know a person named Helme Burns?

A. Yes, I know a lady by that name.

Q. Did you ever meet, did you ever meet a Robert Wilmot at the home of Helme Burns?

A. No.

Q. At any time? A. No.

(Testimony of William Albert Mackie.)

Mr. Luckey: If your Honor please, this is all the same testimony that has been in the record before.

The Court: Yes; I think the record shows that he never met Mr. Wilmot, that he belonged to no other organization except the Teamsters Union, the Epworth League, and the Boy Scouts, and that he didn't belong to the Communist Party. At one time he said he never knowingly belonged to the Communist Party. The testimony also shows that he knew Mr. Lee Knipe very slightly [12] and that he didn't recall very well whether he had ever been a member of the Workers Alliance, but, subsequently, on cross examination he had a vague recollection of belonging to the Workers Alliance prior to the time that he went down to Astoria. He has brought all that out already.

Q. (By Mr. Robinson): Mr. Mackie, are you familiar with the political theories of the Communist Party as they were taught in the years 1937 to 1939? A. No.

Q. Have you ever read any books about Communism? A. No, I have not.

The Court: He has already covered that in his petition for suspension.

Mr. Robinson: Well, not in very great detail, your Honor. The point is, your Honor, that when these hearings were held, the rule in the Rowoldt case and standard set forth in the Rowoldt case had never been promulgated, and that is why we asked for a new hearing on this matter so that the evi-

(Testimony of William Albert Mackie.)

dence could be brought in as to on what basis, if any, Mr. Mackie had a meaningful association with the Communist Party.

The Court: Mr. Mackie has denied he was ever a member of the Communist Party, and if that is true, then he should not be deported.

Mr. Robinson: I grant that. It is very true, your Honor; that's very true. [13]

Q. Mr. Mackie, at the time you were arrested with this warrant of deportation, did you, pursuant to that warrant and the instructions of the Immigration Department, report to the Immigration Officers in this building?

A. I did that morning, the following morning.

Q. The following morning? A. Yes, sir.

Q. Did you there have a conversation with one of the Immigration Officials? A. I did.

Q. Who was he? A. Mr. Fenn.

Q. Mr. Fenn? A. Yes.

Q. Do you know his position?

A. Well, he brought the warrant out. He was a prosecutor for the case.

Q. At that conversation with Mr. Fenn did he indicate to you or offer you any leniency if you would cooperate with the Government?

A. He tried to make a deal with me.

Q. Would you tell us what he told you?

A. He said, "I think you know some information we would like to have." He said if I would cooperate and give it to them, well, he made the mention he would let me off easy. [14]

(Testimony of William Albert Mackie.)

Q. What did you tell him?

A. I said I didn't know anything.

Q. Prior to the hearing on your petition for suspension of deportation was there a conversation held between you, your attorney, between you and the hearing officer? A. Yes.

Q. This was immediately prior to the hearing; is that correct? A. Yes.

Q. What was the substance of that conversation?

The Court: What does this issue go to?

Mr. Robinson: This issue goes to the contention, your Honor, that Mr. Mackie was offered a deal here, but because he didn't care to lie as to his associations and go out and testify against other people to incriminate——

The Court: I have read that. He said he didn't want to be a stool-pigeon.

Mr. Robinson: Yes, but that is not the same testimony.

The Court: How does that go to prove or disprove that in 1938, 1939 and 1940 he had a meaningful association with the Communist Party? What possible connection would that have a statement that he was offered in the '50's if——

Mr. Pozzi: May it please the Court, your Honor, this is the way we believe it was. Bill Mackie would be a fool, and we have so advised him, to say he was not if he were because he would not be here in this courtroom today, not if he had [15] said he was. He understands that. All he has to do is say Yes;

(Testimony of William Albert Mackie.)

but it would be a lie, and so he has chosen not to lie about it either to the Immigration Board lawyers or in this courtroom. This is what it means, then: He had no meaningful association in 1937, 1938 or '9 because he knew no one connected with them. He didn't know this fellow Wilmot that they brought out from New York, a mystery writer, never saw him before in his life. Your Honor, this man does not deserve to be deported on any grounds, and this evidence goes to show lack of meaningful association by inference. That is all we are trying to show.

The Court: You mean that in 1950 a prosecutor said to him that, "If you say that you are a member of the Communist Party we won't deport you;" that that will go to show that he didn't have any meaningful association in 1939?

Mr. Pozzi: The only inference you could draw from his refusal to say he was when he was not is that he must not have had a meaningful association because it is perfectly obvious that the man has been advised as to his rights either way. He knows through his attorneys what the Immigration Service has done in other cases, what the other agency—one other agency has done. He has been advised about those things. The man would have to be a blithering idiot, your Honor, to do otherwise.

The Court: Well, I don't believe that, Mr. Pozzi. I [16] have told you, and I have told a lot of other people I do not like the McCarran-Walter Act. I think it is a terrible Act. If I were in the

(Testimony of William Albert Mackie.)

Congress of the United States, I would have voted against it. If I had been President, I would have vetoed the bill because I think it is outrageous that a man who is brought into the United States at the age of 10 months old one year and who has lived here all his life should be deported. I do not believe that. I do not believe that we ought to send people back to Italy who become gangsters in the United States. I do not believe in these laws; but when the President of the United States appointed me to this position he did not tell me that I could change the laws. He told me that I have to enforce those laws that are on the books, and that is all I have to do.

Now, I am very unsympathetic with this law, but I have got to administer the law, and I have got to call them down the center, and I do it for everybody, not only for the Government or for the defendants, but everyone; and because I am unsympathetic with a law does not mean that I am going to disregard the reach of the law.

Mr. Pozzi: We understand the Court's feelings in the matter, your Honor, but we do feel that this case—at least there is an inference——

The Court: I am going to let you put on your testimony even though I do not think it is admissible. I want to say I [17] do not believe any of this testimony is admissible, but I am going to let it come in because I want to see that he is able to protect his record.

Q. (By Mr. Robinson): Mr. Mackie, in 1937 to 1939 were you a member of any political party?

(Testimony of William Albert Mackie.)

A. No, I wasn't.

Q. You were not a registered voter because you were an alien; is that correct?

A. That's right.

Q. Have you had any political sympathies, sympathies with a political party; were you sympathetic?

A. Well, at the time the Democrats.

Q. Did you have what might be called a political philosophy in 1937 to 1939?

A. No, I didn't.

Q. Do you know what a political philosophy is?

A. I think I could guess, yes.

Q. What is your understanding of that term?

A. I wouldn't know how to explain it. I suppose a fellow should — your ideas in a certain line of thought, what you think is right in certain politics.

Q. It is your testimony that you didn't have any particular political philosophy during this period?

A. No, I didn't.

Q. Is that correct? [18] A. That's right.

Q. Mr. Mackie, what is your opinion of a revolution such as occurred in Russia when the Communists obtained power? Do you know what that question means?

A. Well, I don't know exactly what you would— you mean what I think of it?

Q. That's right.

A. Well, no revolution is very nice. It is a lot of bloodshed and hardship for everybody.

Q. What is your opinion as to whether Commu-

(Testimony of William Albert Mackie.)

nism was the cause or outgrowth of the Russian Revolution? A. I wouldn't know.

Q. What is your personal belief as to the principles of Communism? In other words, what are the principles of Communism?

A. Well, I wouldn't know that either.

The Court: In fact, you don't know anything about Communism, do you?

The Witness: Very little.

Q. (By Mr. Robinson): Did you know anything in 1938 and 1939?

A. No, I—well, I have heard them talk about it, but I don't know very much about it.

Q. What was your impression of what the Communist Party was trying to do? [19]

A. Well, the only thing I heard in those days was more relief and more work, and I never heard anything else; no violent overthrow of the Government, or anything of that sort, but anyplace I went to meetings was always more work and more food.

Q. As far as you know, that was what the Communist Party stood for during that period?

A. I don't know if they stood for that, but I never heard anything against it.

Q. Mr. Mackie, do you know what a plenum is?

A. No, I don't.

Q. Do you know what that word means?

A. Well, I should know what the word means, but I really don't know.

Q. Have you heard of the term plenum used in connection with the Communist Party?

(Testimony of William Albert Mackie.)

A. Oh, I probably read it in the papers at one time or other.

Q. Have you ever attended a plenum of the Communist Party? A. No, I have not.

Q. Or any part thereof? A. No.

The Court: I think you have made your record here. The man says he is not a member of the Communist Party and doesn't [20] know anything about the Communist Party, doesn't know Louis Olson, Rappaport or Murphy. I have read the record. He doesn't know anybody who was active here in the Communist Party during 1937, '38 and '39.

Mr. Robinson: Except Knipe.

The Court: Did you know Rappaport?

The Witness: No, I didn't.

The Court: What were you doing in 1938, '39 and '40?

The Witness: In 1939 I drove a truck on construction, road construction, and '40, and '38 I think I worked for the U. S. Engineers.

The Court: What about '37?

The Witness: I don't think I did much of anything. There wasn't too much work to be got. I just did what I could find to do.

The Court: In 1937 I think you indicated that you had for a short time been a member of the Workers Alliance?

The Witness: Yes, sir.

The Court: Then you went down to Astoria?

The Witness: Yes, sir.

(Testimony of William Albert Mackie.)

The Court: What did you do in Astoria?

The Witness: I worked on construction, road construction, Eastern Oregon and Astoria.

The Court: I think I made a mistake. You know Louis Olson, don't you? [21]

The Witness: Right now, offhand, I don't know him.

The Court: I thought you said in your statement that you knew Louis Olson.

The Witness: I don't remember the name of the man.

The Court: I thought you said you knew him and his mother.

The Witness: I know Lena Olson now since this trouble came up.

The Court: Lena?

The Witness: Yes.

The Court: That is not his wife, is it?

The Witness: Probably—he is about 79 years old, 75.

The Court: But you didn't know that he had once been an organizer for the Communist Party.

The Witness: No, I didn't.

The Court: You found that out later?

The Witness: I didn't find that out either, no.

The Court: All right; go ahead.

Q. (By Mr. Robinson): Are you employed now?

A. Yes.

Q. What is your employment?

A. I am a painter.

(Testimony of William Albert Mackie.)

Q. Are you employed by someone else or self-employed? A. I am self-employed. [22]

Q. In other words, you are a painting contractor; is that the correct term? A. Yes.

Q. This has been your business or profession for some time, hasn't it? A. Yes, it has.

Q. For how long?

A. Five years anyway.

Q. I see. A. For myself.

Q. Are you presently contributing any support to your father at this time?

A. Right now I am not, no.

Q. I see.

A. I pick him up, bring him to work.

Q. What is the state of your father's health at the present time? A. It is very poor.

Q. Has it changed since the hearing in this case?

The Court: Mr. Robinson, I think that this is way beyond the issues of the case.

That was proper on the petition for suspension, and you went into that in great detail.

Mr. Robinson: I am trying to bring the record up to date, your Honor. [23]

The Court: How would that go to the question of whether he had meaningful association in 1937, '38 and '39, the fact that he supports his father in 1958?

Mr. Robinson: I don't suppose it would. Your Honor, I think that is all the testimony of Mr. Mackie.

Mr. Luckey: Your Honor, I believe in the inter-

est of consistency the Government will take the position that the hearing was the basis of the present court action and that we would have no questions.

The Court: You are objecting to the testimony, in the first place; therefore, you do not want to ask him any questions?

Mr. Luckey: That is correct, your Honor.

Mr. Robinson: Your Honor, I am not sure whether this is made part of the record or not, but if it is not we think it should be, that the order and opinion of the Board of Immigration Appeals denying this request for a new hearing should be part of the record.

The Court: I think it might be in this document. Hand this to Mr. Robinson.

(Document presented to Counsel.)

The Court: Mr. Robinson, this is the complete file. Check to see if it is in those documents.

Mr. Robinson: Thank you.

The Court: If it is not—well, we may find out from [24] Mr. Hover. Mr. Hover, is the file which Mr. Robinson has in his hands the complete file?

Mr. Hover: It is, your Honor, and it contains all the original decisions of the Board of Immigration Appeals.

Mr. Robinson:

Mr. Luckey: Copy of which is attached to their petition, your Honor.

Mr. Robinson: Your Honor, the file is complete as far as I can see.

The Court: Do you desire to offer that record now?

Mr. Robinson: Yes, sir.

The Court: All right; it is admitted.

Mr. Luckey: We join in the offer, your Honor.

The Court: It is admitted.

Mr. Robinson: Now we have, your Honor, two character witnesses whose testimony might have some bearing on his meaningful association as alleged, and we wonder if the Court would care to hear testimony of those people?

The Court: I want to say this to you: If a man says, "I am not a member of the Communist Party; I never was a member of the Communist Party; I know very little about the Communist Party," is it your contention that even if he is perjuring himself, if you bring two character witnesses that that goes to the question of his meaningful association?

Mr. Robinson: No, your Honor. [25]

The Court: That is exactly what happened in this record that I have been trying to tell you. The administrative agencies didn't believe Mr. Mackie. At the first hearing he refused to take the stand even though he was warned about the consequences. Then he changed lawyers, and then he had this hearing at which he denied these various things. I have read the opinion, and the opinion says they do not believe Mr. Mackie. Now, really, I do not see what advantage there would be to put on these character witnesses, but I have told you I am letting you make your record. If you want to put him on, that is perfectly all right with me.

Mr. Luckey: We would object, your Honor, for the record.

The Court: All right.

Mr. Pozzi: We would like to call Mr. Sauvnen.

The Court: I am going to consider this is in the nature of an offer of proof.

Mr. Pozzi: All right, your Honor. [26]

OLIVER I. SAUVNEN

a witness called in behalf of Petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Pozzi): Where do you live, Mr. Sauvnen? A. 9038 Northeast Humboldt.

Q. Your occupation is that of a machinist?

A. Yes.

Q. How old are you? A. 45.

Q. How long have you known Bill Mackie?

A. Since about 1930, 1931.

Q. You yourself are a naturalized citizen; is that correct? A. Yes, sir.

Q. You came to the United States in 1923; is that about right? A. I did.

Q. You also were a member of the Armed Forces of the United States and served in World War II; is that correct? A. Yes.

Q. Under what circumstances did you know Bill Mackie since 1930? How did you meet Bill?

A. Well, I can't quite remember how I met him, but we got to be fairly good friends.

Q. Were you active in sports, athletics? [27]

A. Well, in wrestling, weight-lifting only.

(Testimony of Oliver I. Sauynen.)

Q. Was Bill Mackie also active in that sort of thing, in promoting athletics in the '30's when he was——

A. That's quite a ways back to remember. I can't quite recall what sports he was active in.

Q. Do you know Bill Mackie's reputation, then and now, for truth and veracity?

A. Well, as a friend, I couldn't have a better friend.

Q. Was his reputation good in the community?

A. So far as I was concerned.

Q. To your knowledge, was Bill Mackie ever a member of the Communist Party?

A. No, he wasn't.

Q. Were you ever a member? A. No.

The Court: Do you know his general reputation in the community in which he lives for being a law-abiding citizen?

(No response.)

Mr. Pozzi: Answer the question.

The Witness: Pardon?

Mr. Pozzi: Answer the Judge's question.

The Court: You ask the question.

Mr. Pozzi: All right.

Q. Do you know the general reputation in the community here in Portland of Bill Mackie since 1930 up to the present time [28] as far as being a law-abiding citizen? A. Yes.

Q. What is his reputation?

A. Good, as far as I know.

The Court: Were you a neighbor of his?

(Testimony of Oliver I. Sauvnen.)

The Witness: I lived a few blocks away from him.

The Court: Did you ever work with him?

The Witness: No. I did work on his car for him once in a while.

The Court: In 1937, '38 and '39 did you see him almost every day, or how often did you see him?

The Witness: Well, I used to see him once a week anyhow. In those days we were going to dances together.

The Court: Were those dances put out by the Workers Alliance and the Finnish Federation?

The Witness: No, I won't say they were. We went to places like Springer's Club.

The Court: You were going to the other dances. You were not going to Lenai and various places like that?

The Witness: No.

The Court: Are you Finnish?

The Witness: Yes.

The Court: You did not go to various Finnish associations?

The Witness: Oh, I used to go up to the hall once in a while to see if anybody was there. Then if there wasn't anybody [29] there I took off.

The Court: Then you would go out to Springer's?

The Witness: Yes, someplace out there.

The Court: Did you have any discussions with Mr. Mackie with reference to the political situation?

(Testimony of Oliver I. Sauvnen.)

The Witness: Never.

The Court: So you don't really know what his political views were?

The Witness: No, I couldn't say.

The Court: Go ahead.

Q. (By Mr. Pozzi): Did he ever try to talk Communism with you? A. No.

Q. You were close friends; is that right?

A. Yes.

Mr. Pozzi: That's all.

Mr. Luckey: No questions.

Mr. Robinson: I think that is all the witnesses we care to call at this time.

The Court: He wants to call another one.

Mr. Pozzi: We have some that have just known him a few years.

The Court: Do you want to have Mr. Mark Chamberlain, do you want to have him as a witness for you?

Mr. Pozzi: He has no connection with this case.

The Court: I have been reading the documents.

Mr. Pozzi: There is no connection.

(Witness excused.) [31]

ELIZABETH HAMLIN

a witness produced in behalf of Petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Pozzi): Where do you live, Mrs. Hamlin? A. 4056 North Albina.

(Testimony of Elizabeth Hamlin.)

Q. How long have you lived here in Portland?

A. Oh, I have been here 1911.

Q. How long have you known Bill Mackie?

A. Oh, since he was a young man. I think about thirty-one or two years.

Q. Mrs. Hamlin, under what circumstances did you know him?

A. Well, I always know that he has been very nice young man for, very nice fellow.

Q. Did he live near your house, within a few blocks, seven or eight blocks of your house, when he was a young man?

A. Well, no, but I know his folks and used to go once in a while to his home to see his mother and father.

Q. You visited in his home? A. Yes.

Q. You are Finnish, aren't you, Mrs. Hamlin?

A. Yes, sir.

Q. How old are you? A. I am 73. [32]

Q. Mrs. Hamlin, do you know what Bill Mackie's general reputation in the community was from the time you have known him and up to the present time, as to whether or not he has been a law-abiding citizen?

A. Well, I think he was a very good.

Q. You are not a Communist, are you?

A. Well, no, I never have even studied Communist. I don't know anything about it.

Q. No. You visited in Bill Mackie's home during the '30's; '37, '38 and '9?

(Testimony of Elizabeth Hamlin.)

A. Yes, the time I began to meet, that's about 31 or 32. That's the time we meet.

Q. Did you ever hear Bill Mackie talking to you or to anybody else about Communism or being a Communist?

A. I don't know anything about Communist, because I never studied Communist.

Q. Did you ever hear Bill Mackie talking about it? A. I don't think so, no

Mr. Pozzi: That's all. Well, one other question:

Q. What is his general reputation for truth and veracity, for being a truthful man?

A. Will you tell me that again?

Q. What is his general reputation for truth and veracity in the community; that is, for being honest and telling the truth and not being a liar?

A. Very nice. I don't see nothing wrong.

Q. Is he known as an honest——

A. He is very honest, and the whole family is very honest people.

Mr. Pozzi: That's all.

Mr. Robinson: That is all the testimony, your Honor.

The Court: Mr. Robinson, I told you I would give you an opportunity to complete your record on the motion. Go ahead.

(Witness excused.) [34]

Mr. Robinson: Your Honor, we have certain citations that we would like to put into the record.

The Court: You will have all the time you

want. At the time I stopped you before I didn't think it was a propitious place to do it, but go ahead now.

Mr. Robinson: We have made constitutional objections to the Act under which Mr. Mackie is being deported; that is, the Immigration and Naturalization Act, as amended. We renew the constitutional objections which were made in the previous case. We appreciate that the Court on those matters is bound by the Supreme Court decisions in the Harisiades vs. Shaughnessy and Galvan vs. Press cases, which your Honor knows, [34] and we wish to renew those objections for the record, particularly that the Act violated the First Amendment of the United States Constitution in that it impinges upon the freedom of speech of the Petitioner. Secondly, that it is an ex post facto law, and, thirdly, that it is violative of the Fifth Amendment in that it abridges Petitioner's right to due process of law, both substantive and procedural.

Finally, that the Act is a Bill of Attainder.

Now, from reading both the Shaughnessy case and the Galvan v. Press case, it indicates to me that the issue of Bill of Attainder was never reached by the Supreme Court in either of those cases and that that is an open issue. I don't know whether the Court cares to hear argument on that.

The Court: That was raised the last time.

Mr. Robinson: It was never adjudicated by the Court or mentioned in the opinions.

The Court: Me?

Mr. Robinson: By your Honor in the other case.

The Court: That was one of the issues raised, and I have read Justice Black's decision and opinion in which he raises that and comments upon it.

Mr. Robinson: He mentioned it, yes. Well, we wish to raise these matters, and on those grounds we move for judgment [35] in this case for the Petitioner. I think those are all the constitutional matters.

Your Honor, there seems to be a thought here that it might be helpful to the Court (This is, of course, up to your Honor), but we would be very happy to submit within a couple of days a brief comparing the record in Mr. Mackie's case in so far as alleged association with Communism with those which appear from the opinion the Supreme Court in the Rowoldt case.

The Court: Mr. Robinson, I will save you the trouble. I didn't go to bed until after 1:00 o'clock this morning, and I did that last night. I did that myself. That is the reason I know what is in that transcript, because I read it last night, and I read the Rowoldt decision, and then I read the Galvan vs. Press and the Harisiades case.

Mr. Robinson: That is all.

The Court: Mr. Luckey?

Mr. Luckey: The Government will stand on the record, your Honor. Of course, as your Honor appreciates, under the decisions the remedy concerning judicial review is to some extent limited, and we think that the record does support the finding of the Immigration and Naturalization

Service by substantial evidence. That will be the position of the Government.

I could suggest distinctions between the Rowoldt case, but I think that your Honor is undoubtedly aware of them. Of [36] course, in this situation the Rowoldt case was a voluntary disclosure by an individual who claimed no meaningful association, but here there is evidence of meaningful association denied by the Petitioner, found adversely to him by the Service, which, of course, I think makes the case more analogous to Galvan against Press than it does to the Rowoldt case; that distinction.

Mr. Robinson: I think there is a distinction. The distinction is that the Rowoldt case is much stronger for deportation than Mr. Mackie. This is not a question of the suspension of deportation where the admissions of the party have any bearing whatsoever, as in the Rowoldt case. This is a question simply whether or not there was meaningful association on the grounds of deportability in the first instance, and Mr. Mackie has denied any associations with Communism.

The record shows two very untrustworthy witnesses whom we feel should be brought here to give fully their testimony and to be cross-examined and impeached by their own statements. On the other hand, the Rowoldt case is replete with a political sophistication which Mr. Mackie, both from this record and his testimony today, simply does not have.

I think the Government has failed consistently to carry any burden of proof whatever in this case.

and I think for that reason Mr. Mackie should not be deported.

The Court: First as to the constitutional grounds, I [37] think that you were well aware all those grounds had been raised in his previous petition for writ of habeas corpus, and I considered them and held against him, and the Court of Appeals affirmed me on my opinion.

At that time, also, I considered the question of whether the testimony addduced at the hearing was sufficient to sustain the Board's findings, and I came to the conclusion that there was ample evidence to do that.

I cannot see how the Rowoldt decision helps this Petitioner, for the reason that the Petitioner, unlike Rowoldt, has always denied any participation in the Communist Party, any knowledge. On the contrary, there were two witnesses who testified to his participation.

Now you may attack Knipe all you want, but Knipe was trying to do Mackie a favor. He testified that he was a truthful man, that he never did anything that he didn't come to his educational needs. He was trying to avoid trying to bring Knipe into any type of meaningful association until cross examination when it was brought out.

As far as the other testimony is concerned, if the testimony is to be believed—and the Board apparently believed it—this man went to meetings over a period of a year and a half regularly. He attended weekly meetings. He worked at the book store even though he didn't get any money. He

met at the Labor New Dealer back office. He went to Aberdeen [38] where there was a District Director of the Communist Party. Rappaport was there on a high-level meeting. He was not a plain, ordinary member, according to the testimony, but he was a man who was on the Executive Board. Now that is a lot different than Rowoldt. It does not make any difference whether he denies it or not; that is what the administrative board held, and just because he denies it you cannot say that this is a better case than Rowoldt. The fact is that there is much more in this record than that in the Rowoldt case.

I believe that the testimony that was adduced here today is absolutely immaterial. I do not think it was properly admitted, but I permitted you to do it in order to make a record, but there is nothing here that changes my opinion that I had when the case was before me before, and, as I said, there is nothing in the Rowoldt decision which I believe can help the Petitioner.

Perhaps I should make it clear that I not only think there was evidence in the record to sustain the findings that way, but I believe that the testimony is true. I believe the testimony of Bob Wilmot, and I believe the testimony of Knipe, and I do not believe Mr. Mackie's testimony. I believe that he perjured himself before, and I believe that he perjured himself today because I think that the evidence is clear that he was a member of the Communist Party during the period in which it is said that he was a member. [39]

For that reason I will discharge the writ.

Mr. Robinson: If your Honor please, I wonder if—well, to request at this time. First, a statement of exception to enable us to prepare notice of appeal?

The Court: Very well.

Mr. Robinson: And continuing Mr. Mackie on bond.

Mr. Luckey: He is not on bond at this time, your Honor.

Mr. Hover: He is under our bond. He is not on the Court bond.

The Court: This record shows that this proceeding was commenced on June 17, 1952. He has been here close to six years from the time the Government proceeded. Apparently he has not done anything violent during all these periods of time. I think we can wait a few days.

As far as the bond is concerned, hold up your judgment. I mean hold up the entry of judgment until you are able to perfect your appeal papers.

Mr. Luckey: The previous bond, your Honor, in the previous proceeding was $5,000.

Mr. Pozzi: Wasn't that lowered at one time, Mr. Hover?

Mr. Hover: I do not recall.

Mr. Luckey: That is the one with the Immigration Service.

The Court: Frankly, I was going to refuse bail in this case, and I am going to hold up the entry of judgment until you tell me that it is all right,

and you make your application [40] to the Court of Appeals for the bond.

Mr. Robinson: Thank you, your Honor.

The Court: Because I cannot conscientiously give this man a bond in view of what I have held, and I want to give you time in which to make your presentation to the Court. [41]

On Monday, April 14, 1958, at 10:00 A.M., the following proceedings were had in the within-entitled cause. At this time and place Mr. Nels Peterson, of Attorneys for Petitioner, appeared in behalf of Petitioner, and Mr. C. E. Luckey, United States Attorney, appeared in behalf of Respondents.

Mr. Luckey: Your Honor, I have an order to submit. I have provided counsel for the Petitioner with a copy of proposed orders finalizing your Honor's order, as we understood at the completion of the hearing on the 10th. That is Civil 9741.

The Court: Is the Petitioner in court?

Mr. Peterson: Yes, your Honor.

(Petitioner, William Albert Mackie, comes forward.)

The Court: There is no provision here for bail or temporary restraining order or the fact that I denied this application. Did you intend to make a motion over again?

Mr. Peterson: It was my understanding from what your Honor had indicated that any restraining order or any enlargement on bail would have

to be down to the Court of Appeals. That was my general understanding. I just talked to Mr. Hover, and he advises me that, pending arrangements for his [42] transportation to Finland, he will continue him on his present bail, but he does intend to deport him forthwith.

I have prepared notice of appeal and bond for costs on appeal and would like to go to the Court of Appeals for enlargement on bail.

The Court: I am prepared to sign the order, but I think I should state the reasons why I am entering the order and why, as I stated previously, I would not grant the Petitioner bail or issue any restraining order.

The petition for a writ of habeas corpus in Civil No. 9741 was filed because the Board of Immigration Appeals refused to grant Petitioner either a new hearing or, in the alternative, discharge the warrant of arrest and remove the Petitioner from the class of deportable aliens on the basis of the Rowoldt case.

I have carefully reread the complete Immigration file in this case, which includes all the documents filed since June 17, 1952, and all the testimony taken in all of the hearings that were held. I have also read the Rowoldt case, and I am convinced that Petitioner does not come within the reach of the Rowoldt decision.

In the Rowoldt case, the Petitioner there, with commendable frankness, admitted his membership in the Communist Party and set forth in detail the activities in which he was engaged during the

short period of time during which he was a [43] member. The Government's whole case rested on the statements made by Rowoldt to an Immigration Inspector, and the truthfulness of Rowoldt's statements was not called into question. On the basis of such statements, the Court found that he had no meaningful association with the Communist Party.

In this case, unlike the Rowoldt case, the Petitioner has consistently denied his membership in the Communist Party. The Government produced two witnesses to prove his membership. One of them testified that he attended a plenum with Petitioner at Aberdeen, Washington, which plenum was attended by the top officials in the Pacific Northwest of the Communist Party. He further testified that the Petitioner was a member of the top fraction of the local Communist organization and that he was well aware of what was going on. ("He knew where he was going.") Another witness testified that he had attended from 30 to 35 closed meetings with the Petitioner, and I believe he also testified that Petitioner was on the Executive Board of the local Communist organization.

At this hearing before the Immigration Service Petitioner was given the opportunity to refute the testimony of these two witnesses and to explain his participation, if any. He refused to accept this invitation, even though he was warned of the consequences of his failure to testify.

After he was ordered deported, he did testify at a suspension of deportation hearing. At this hearing he denied [44] that he was a member of the Communist Party. His testimony, however, was evasive and unsatisfactory, and, as I pointed out in my prior opinion, his testimony was far from convincing.

In the present petition he also raised each of the constitutional grounds that he raised in the prior petition. I found that there was no merit in these contentions on the basis of Harisiades v. Shaughnessy, 342 U.S. 580, and Galvan v. Press, 347 U.S. 522.

Although the prior case was affirmed on the basis of my opinion and certiorari was denied, Petitioner raises the identical grounds in this petition.

The proceedings by which the Government has been attempting to deport Petitioner because of his alleged Communist activities have been going on for many years.

On June 17, 1952, Petitioner was served with a warrant of arrest.

On May 11, 1953, a hearing was held.

On June 30, 1953, a Special Inquiry Officer found the Petitioner was a former member of the Communist Party and ordered him deported.

On July 2, 1953, Petitioner appealed this decision to the Board of Immigration Appeals.

On September 8, 1953, the Board of Immigration Appeals dismissed the appeal.

On November 11, 1954, the Petitioner filed a motion [45] to reopen the proceedings.

On December 23, 1954, the Board of Immigration Appeals ordered the warrant of deportation withdrawn, and the Petitioner was given an opportunity to apply for a suspension of his deportation under Section 244 (a) (5) of the Immigration and Naturalization Act of 1952.

On February 2, 1955, a hearing on the application for suspension was held.

On February 16, 1955, the Special Inquiry Officer who presided at this hearing denied the application.

On March 2, 1955, Petitioner appealed this decision to the Board of Immigration Appeals.

On May 13, 1955, the appeal was denied.

By that time a petition, and later an amended petition, for a writ of habeas corpus and for injunctive relief had already been filed in Civil No. 7833.

On February 21, 1956, trial was held in Civil No. 7833.

On March 2, 1956, I rendered my opinion, denying the writ.

On March 7, 1956, Petitioner filed notice of appeal, and thereafter the appeal was perfected, briefs filed and oral arguments held.

On February 8, 1957, the Court of Appeals affirmed my opinion per curiam on the grounds and for the reasons stated in my opinion. [46]

On December 16, 1957, Petitioner's application for certiorari was denied.

On December 27, 1957, Petitioner filed a motion before the United States Immigration and Naturalization Service for another hearing based upon the Rowoldt case.

On March 26, 1958, Petitioner's application was denied after a re-examination of the entire proceedings, and in which it was pointed out that the petition for certiorari was denied eight days after the Supreme Court announced its decision in the Rowoldt case.

On April 4, 1958, the present petition for a writ of habeas corpus and complaint for injunctive relief to prevent agency action, Civil No. 9741, was filed just a few days before the Petitioner was ordered to surrender for deportation.

In my opinion, there is no more merit in this petition than there was in the previous one.

Almost six years have elapsed since the warrant was served upon the Petitioner, and the delay in this case, like in the case of Martin Jiminez v. Bruce Barber, decided by the Court of Appeals for this Circuit on January 30, 1958, has been occasioned solely by Petitioner's resort to administrative and court proceedings to assert contentions which have been found to be without merit.

I recognize that the law under which the Petitioner is being deported is a harsh one, but this is a matter for the [47] legislative branch of the Government and is outside the power of the Court.

In my view there was no substantial question asserted in this petition, and it is without merit. I assume that the Petitioner intends to appeal to

the Court of Appeals, and when the appeal is dismissed, he will again seek certiorari to the Supreme Court of the United States. In my opinion these appeals will be frivolous and taken solely for the purposes of delay.

I have denied defendant bail and have refused to grant any order which would prevent his immediate deportation. Of course, when the application is made to the Court of Appeals, that will be their responsibility.

I am going to sign the order presented by the United States Attorney unless there is objection to the form.

Mr. Peterson: No objection.

[Endorsed]: Filed May 21, 1958.

[Endorsed]: No. 15990. United States Court of Appeals for the Ninth Circuit. Willia Niukkanen, also known as William Albert Mackie, Appellant, vs. John P. Boyd, District Director, Immigration and Naturalization Service and Ernest Hover, Officer in Charge, Immigration and Naturalization Service, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: May 26, 1958.

s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
For The Ninth Circuit

No. 15,990

WILLIA NIUKKANEN, also known as WILLIAM NIUKKANEN, also known as WILLIAM ALBERT MACKIE,

Petitioner-Appellant,

vs.

JOHN P. BOYD, District Director, Immigration and Naturalization Service, United States Department of Justice, and ERNEST HOVER, Officer in Charge, Immigration and Naturalization Service Office, United States Department of Justice, at Portland, Oregon,

Respondents-Appellees.

CONCISE STATEMENT OF POINTS ON APPEAL

Comes Now Petitioner-Appellant, Willia Niukkanen, and respectfully submits the following concise statement of points to be relied upon in this appeal:

1. The trial court erred in denying the petitioner's petition and in dismissing the same because petitioner is not within the class of deportable aliens under the Immigration and Nationality Act as amended, as interpreted by the United States Supreme Court in various recent decisions, including the case of Rowoldt v. Perfetto, 355 U.S. 115.

2. The trial court erred in denying petitioner-appellant's motion that the Federal Bureau of Investigation statements and reports of the witnesses who testified against the petitioner-appellant in the immigration department hearings be made available to petitioner and his attorneys.

3. The trial court erred in denying petitioner's motion that the witnesses Wilmot and Knipe, who testified against the petitioner-appellant at the immigration department hearings, be recalled to give testimony in this cause relating to the question of whether petitioner-appellant is within the class of deportable aliens under the Immigration and Nationality Act as interpreted by the United States Supreme Court in various recent decisions including that of Rowoldt v. Perfetto, supra.

4. The trial court erred in denying petitioner's petition and in dismissing it, because the Immigration and Nationality Act as amended, is in violation of the United States Constitution in that said Act violates freedom of speech and association, due process of law, and is a bill of attainder and an ex post facto law.

Dated this 4th day of June, 1958.

s GERALD H. ROBINSON,
Of Attorneys for Petitioner-Appellant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed June 6, 1958. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD ON APPEAL

Comes Now Petitioner-appellant, Willia Niukkanen, and respectfully designates the following as his record on appeal:

1. The entire record in the United States District Court for the District of Oregon in this case, including the entire transcript of proceedings before the Honorable Gus J. Solomon, Judge of the United States District Court for the District of Oregon, and all of the pleadings and other documents filed in said case, and all of the exhibits admitted into evidence in said case.

Dated this 4th day of June, 1958.

/s/ GERALD H. ROBINSON,
Of Attorneys for Petitioner-Appellant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed June 6, 1958. Paul P. O'Brien, Clerk.

[fol. 90] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15990

WILLIA NIUKKANEN, etc., Petitioner,

vs.

JOHN P. BOYD, et al., Respondents.

ORDER RELATIVE TO ENLARGING PETITIONER ON BAIL—
Filed April 22, 1958

Petitioner Niukkanen, while under deportation orders, petitioned the United States District Court for the issuance of the writ of habeas corpus and release from custody of immigration officials. The District Court denied issuance of the writ and this appeal followed.

Petitioner now requests we order him enlarged upon bail pending further proceedings.

We are of the opinion that there is a substantial question of law in the appeal and therefore order that the order for deportation be stayed pending further order of this Court. And it is further ordered that petitioner be enlarged upon the posting of bail in the sum of $2000.00 to be approved by the District Court or a Judge thereof.

Albert Lee Stephens, Chief Judge; Walter L. Pope, Frederick G. Hamley, Circuit Judges.

[fol. 91]

MINUTE ENTRY OF ORDER OF SUBSTITUTION—December 11, 1958 (omitted in printing).

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—December 11, 1958 (omitted in printing).

[fol. 92]

MINUTE ENTRY OF ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT—April 6, 1959 (omitted in printing).

[fol. 93]

IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15,990

WILLIA NIUKKANEN, also known as WILLIAM NIUKKANEN, also known as WILLIAM ALBERT MACKIE, Appellant,

vs.

E. D. MCALEXANDER, Acting District Director, Immigration and Naturalization Service, Department of Justice, Appellee.

Appeal from the United States District Court for the District of Oregon

OPINION—April 6, 1959

Before: Stephens, Chambers, and Hamley, Circuit Judges

Hamley, Circuit Judge:

In this habeas corpus proceeding petitioner seeks to invalidate an order for his deportation as an alien who has been a member of the Communist party. After a hearing in the district court, an order was entered dismissing his application. Petitioner appeals, contending that he was

not shown to have a "meaningful" association with the Communist party, as that term is used in Rowoldt v. Perfetto, 355 U. S. 115, 120. He also argues that the act under which he was ordered deported is unconstitutional.[1]

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[1] The warrant of arrest in the deportation proceedings was issued on June 17, 1952. The statute under which the proceedings were instituted was therefore § 22 of the Internal Security Act of 1950, 64 Stat. 987, 1006 (amending the Act of October 16, 1918, 40 Stat. 1012, as amended) as amended by § 1 of the Act of March 28, 1951, 65 Stat. 28. The applicable part of § 22 of the 1950 act prior to the 1951 amendment reads as follows:

"That any alien who is a member of any one of the following classes shall be excluded from admission into the United States:

. . . . .

"(2) Aliens who, at any time, shall be or shall have been members of any of the following classes:

. . . . .

"(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States . . .

. . . . .

"Sec. 4. (a) Any alien who was at the time of entering the United States, or has been at any time thereafter, . . . a member of any one of the classes of aliens enumerated in section 1(2) of this Act, shall, upon the warrant of the Attorney General, be taken into custody and deported in the manner provided in the Immigration Act of February 5, 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry into the United States."

The 1951 amendment to the above-quoted statute reads as follows:

". . . That the Attorney General is hereby authorized and directed to provide by regulations that the terms 'members of' and 'affiliated with' where used in the Act of October 16, 1918, as amended, shall include only membership or affiliation which is or was voluntary, and shall not include membership or affiliation which is or was solely (a) when under sixteen years of age, (b) by operation of law, or (c) for purposes of obtaining employment, food rations, or other essentials of living, and where necessary for such purposes."

Such a regulation was promulgated by the Attorney General, effective April 4, 1951. See 16 Fed. Reg. 2907.

The amendatory act of March 28, 1951, setting out the above-quoted qualifications upon the meaning of the terms "members of" and "affiliated with" was repealed by the Immigration and Na-

[fol. 94] Petitioner, whom we shall call Mackie, is a native and citizen of Finland. He entered the United States in 1909 at the age of ten months, and has resided in this country continuously since that time. Mackie has lived in Portland, Oregon, for about thirty-three years. He had service in the United States Army for three months in [fol. 95] 1941, and for three days in 1942. He was honorably discharged for the "convenience of the government." Mackie married an American citizen on June 24, 1945. There are no children as the issue of this marriage, but his wife has a sixteen-year-old son by a former marriage. Mackie's aged father and mother and two sisters also reside in this country.

On June 17, 1952, a warrant for the arrest and deportation of Mackie was issued by a district director of the Immigration and Naturalization Service. The warrant was served on September 12, 1952. A hearing was held before a special inquiry officer beginning May 11, 1953, and ending May 21, 1953.

On June 30, 1953, the special inquiry officer issued a written decision determining that Mackie was deportable and ordering his deportation. The ground stated for this action was that Mackie had become a member of the Communist Party of the United States after entry into this country. The specific finding was that Mackie had been a member of the Communist party during the years 1937-1939.

Mackie appealed to the Board of Immigration Appeals. The Board found that the record established the ground of deportability by reasonable, substantial, and probative evidence. The appeal was accordingly dismissed on September 8, 1953. On November 11, 1954, Mackie moved to reopen the deportation proceedings to enable him to apply for suspension of deportation. This motion was denied on November 29, 1954, but when later renewed was granted on December 23, 1954.

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tionality Act of 1952, 66 Stat. 163, 280, effective December 24, 1952. See Schleich v. Butterfield, 6 Cir., 252 F.2d 191, 193. But the substance of the relevant portion of § 22 as originally enacted was incorporated in the Immigration and Nationality Act of 1952, 66 Stat. 163, 205, 8 U.S.C.A., § 1251(a)(6)(C). See Rowoldt v. Perfetto, supra, page 116.

The reopened hearing was held before a special inquiry officer. This officer, on February 16, 1955, entered a written opinion denying the application for suspension of deportation. Suspension was denied for the reason that Mackie had not made a "clean break" with the Communist party, and there was reason to believe that he was still sympathetic to its principles. The Board of Immigration Appeals affirmed this ruling on May 13, 1955.

While this application for suspension of deportation was pending, Mackie, on December 13, 1954, filed a petition in the United States District Court for a writ of habeas corpus. The grounds on which Mackie relied in this petition were that the evidence did not support the order of deportation, and the statute under which the order was entered [fol. 96] was unconstitutional. After the order denying suspension of deportation was entered on February 16, 1955, Mackie amended his petition for a writ of habeas corpus to include as an additional ground that the denial of his motion for suspension of deportation was arbitrary and capricious.

The district court after hearing rendered a decision denying the application for a writ of habeas corpus. Niukkanen v. Boyd, D.C.D.Ore., 148 F.Supp. 106. An order to this effect was entered on March 6, 1956. Mackie appealed to this court and we affirmed. Niukkanen v. Boyd, 241 F.2d 938. Certiorari was denied on December 16, 1957. 355 U.S. 905.

Rowoldt v. Perfetto, supra, was decided by the Supreme Court on December 9, 1957. On December 27, 1957, Mackie filed a motion before the United States Immigration and Naturalization Service for another hearing on his status as a deportable alien. The ground stated for this motion was that the decision in Rowoldt redefined the evidential and substantial requirements of membership in the Communist party so as to take Mackie out of the class of deportable aliens. This motion was denied by the Board of Immigration Appeals on March 26, 1958.

Relying on the same ground and also renewing the contention that the act is unconstitutional, Mackie filed the instant habeas corpus proceeding on April 4, 1958. The petition was denied by the district court, after hearing, on April 14, 1958, and this appeal followed.

The contention that the act under which the deportation order was entered is unconstitutional as applied to Mackie is identical with a similar contention made on the previous appeal. It was there disposed of adversely to Mackie and will not be re-examined at this time.[2]

We therefore turn to appellant's contention based on the Supreme Court decision in Rowoldt. Mackie argues that it was not proved that he had been a "member" of the Communist party within the meaning of that statutory term, as construed in the Rowoldt decision.

[fol. 97] In Galvan v. Press, 347 U.S. 522, the Supreme Court for the first time dealt with the meaning of the term "member" as used in § 22 of the Internal Security Act of 1950. In the course of its opinion the court discussed the kind of a showing which would be insufficient to establish membership and the kind of a showing that would not be required. It further defined the minimum showing that would have to be made by the government.

It was held, at least inferentially, that membership would not be established by proof that an alien had accidentally, artificially, or unconsciously in appearance only, joined the Communist party with no real knowledge of its platform and purposes. On the other hand, the court ruled, establishment of membership did not require proof that an alien had joined the Communist party with full appreciation of its purposes and program. The minimum proof required to establish membership, the court held, was that an alien had "joined the Party, aware that he was joining an organization known as the Communist Party which operates as a distinct and active political organization, and that he did so of his own free will."

Applying the latter test, the court in Galvan found that under the evidence upon which the hearing officer apparently relied the alien had been a "member" of the Communist party and was therefore deportable. This evidence was to the effect that the alien joined the party on the request of a man he assumed to be an organizer, he attended a number of meetings, he did not apply for citizenship because he feared his party membership would be exposed,

[2] See, also, Ocon v. Guercio, 9 Cir., 237 F.2d 177, 179-180.

and he had been active in, and an officer of, the Spanish Speaking Club, an alleged Communist party unit.

In Rowoldt v. Perfetto, supra, the Supreme Court did not purport to modify the principles to be applied in construing the term "member" as announced in Galvan v. Press. It applied those principles to what the court regarded as the different facts of the Rowoldt case. It concluded that the minimum requirements of proof referred to in Galvan had not been met.

In this connection the court stated in effect that the evidence in Rowoldt failed to establish "the kind of meaningful association" required by the 1950 act, as amended. The use of the words "meaningful association" is but a shorthand [fol. 98] way of referring to the minimum-proof requirement for establishing membership as set out in Galvan.

The precedent value of Rowoldt, then, is not to be derived from an undue emphasis upon the words "meaningful association," as used in that opinion. Rather, it is to be gained by comparing the evidence of membership which was there found to be insufficient with that contained in the record of the case under current consideration.

In Rowoldt v. Perfetto the finding of "membership" rested on Rowoldt's own testimony. According to that testimony, Rowoldt joined the Communist party in the spring or summer of 1935, paid dues, and attended meetings. He remained a member until arrested late in 1935 in connection with deportation proceedings. His reason for joining the party was that he regarded the party and the "fight for bread" as going "hand in hand."

Rowoldt testified that he had no job at the time and that those around him had the idea that they had to fight for something to eat and for clothes and shelter. He and his associates, Rowoldt testified, were not thinking of "overthrowing anything." In stating that they had to "fight" for something to eat, Rowoldt meant that they had to ask the city, state, and national government for help. The kind of help they wanted was exemplified by the unemployment laws later passed and economic assistance received.

Rowoldt's only active work for the party was that of running its bookstore for a short period. He was a salesman in the store but received no compensation. This store was

an official outlet for communist literature. Rowoldt testified that he never advocated change of government by force or violence.

In the instant case, unlike Rowoldt, the government produced independent evidence concerning the alien's communist activities, and the latter initially offered no refutation except that of character witnesses. At the original hearing held in May, 1953, Mackie was called to the witness stand by the special inquiry officer and answered general questions concerning his age, residence, place of birth, and the like. The government then called two witnesses.

According to their testimony, Mackie was a dues-paying, card-carrying member of the Communist party from at least [fol. 99] 1937 until 1939. In the latter year he was dropped from membership for nonpayment of dues. During the period of his membership Mackie attended from thirty to thirty-five meetings of the "Albina Section" of the Communist party in Portland, Oregon. Once or twice a month Mackie went to the office of the "Labor New Dealer," a weekly trade union newspaper, to obtain copies for distribution. This newspaper was Communist controlled, and was considered to be a Communist party "setup."

Frequently during these visits to the newspaper office Mackie actively participated in discussions which members of the Communist party held in a back room. These discussions pertained to the policies of the party and the circulation of the newspaper as a party organ. On one occasion Mackie attended a closed party meeting in Aberdeen, Washington, referred to in party circles as a "plenum." This term was used by members of the party in referring to a meeting held for the purpose of reporting the regional activities carried on within the party.

Mackie, according to this testimony, was not an ordinary member of the Communist party, but belonged to what members of the party called the "top fraction," except with regard to its waterfront activity.

At the close of the government's case, several character witnesses were called to testify in Mackie's behalf. As before noted, however, Mackie declined to take the witness stand himself for the purpose of refuting the testimony of the government witnesses concerning his association with

the Communist party.[3] At later hearings on his motion to suspend the order of deportation, and in the district court on this habeas corpus application, Mackie did testify—categorically denying that he had ever been a member of the Communist party.

Although appellant attacks the credibility of the government witnesses, the special inquiry officer apparently found their testimony worthy of belief. The Board of Immigration Appeals and the district court found no warrant for [fol. 100] re-evaluating that testimony, and neither do we. Precedent for adopting this course is to be found in Galvan v. Press, where the Supreme Court deemed it appropriate to accept evidence which the hearing officer had found reliable.

In our view the evidence in the instant case more than meets the minimum requirements of proof to establish Communist party membership, as set out in Galvan v. Press, and as referred to in Rowoldt v. Perfetto as "meaningful association." There is no indication here, as in Rowoldt, that the alien joined the party only for "bread and butter" purposes. On the contrary, our appellant, unlike Rowoldt, actively participated in party councils, and was considered to be in a relatively high regional echelon of the party.

Mackie's association with the Communist party, in our opinion, was at least as meaningful as that of Galvan in Galvan v. Press.[4] It was much more meaningful than that of Diaz in Diaz v. Barber, 9 Cir., 264 F.2d 300, whom this court characterized as "a small rabbit in the Communist hutch."

Affirmed.

[File endorsement omitted]

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[3] The disadvantage to Mackie in his failure to rebut the testimony given by the government witnesses was called to his attention by the special inquiry officer, but Mackie persisted in his refusal to give further testimony.

[4] See, also, Williams v. Mulcahey, 6 Cir., 253 F.2d 769; Wellman v. Butterfield, 6 Cir., 253 F.2d 932; and Hong Youn Choy v. Barber, D.C.N.D.Cal., 162 F.Supp. 629, all of which refer to Rowoldt v. Perfetto, but hold the evidence sufficient to sustain a deportation order.

[fol. 101] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15,990

WILLIA NIUKKANEN, etc., Appellant,

vs.

E. D. MCALEXANDER, etc., Appellee.

JUDGMENT—Filed and Entered April 6, 1959

Appeal from the United States District Court for the District of Oregon.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Order of the said District Court in this cause be, and hereby is affirmed.

[fol. 102]

IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Before: Stephens, Chambers and Hamley, Circuit Judges

MINUTE ENTRY OF ORDER DENYING PETITION FOR REHEARING —May 19, 1959

On consideration thereof, and by direction of the Court, It Is Ordered that the petition of Appellant, filed May 4, 1959, and within time allowed therefor by rule of court for a rehearing of the above-entitled cause, be, and hereby is denied.

[fol. 103] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 105]

SUPREME COURT OF THE UNITED STATES

No. 130, October Term, 1959

WILLIA NIUKKANEN, etc., Petitioner,

vs.

E. D. MCALEXANDER, etc.

ORDER ALLOWING CERTIORARI—October 12, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.